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In The Supreme Court of the United States

DAVID M. HICKS, in his official capacity as Commonwealth's Attorney for the City of Richmond, and WADE A. KIZER, in his official capacity as Commonwealth's Attorney for the County of Henrico,

Petitioners,

v.

RICHMOND MEDICAL CENTER FOR WOMEN, and WILLIAM G. FITZHUGH, M.D.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When a statute regulates abortion, may federal courts allow a facial challenge alleging overbreadth?

2. When a statute regulates partial birth abortion or similar abortion procedures, does the Constitution require that the statute contain a health exception?

PARTIES TO THE PROCEEDINGS

There are two petitioners – David M. Hicks, in his official capacity as Commonwealth's Attorney for the City of Richmond and Wade A. Kizer, in his official capacity as Commonwealth's Attorney for Henrico County, Virginia. Both Mr. Hicks and Mr. Kiser serve as the elected local prosecutor in their respective local jurisdictions in Virginia. In that capacity, both of them have responsibility for prosecuting violations of Virginia's criminal statutes, including *Virginia Code* § 18.2-71.1.

There are two Respondents – Richmond Medical Center for Women and Dr. William G. Fitzhugh. The Richmond Medical Center for Women is an abortion clinic located in Richmond, Virginia. Dr. William G. Fitzhugh is a physician who performs abortions. Dr. Fitzhugh is also the founder, owner, and medical director of the Richmond Medical Center for Women.

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PETITION FOR A WRIT OF CERTIORARI

The Attorney General of the Commonwealth of Virginia, Judith Williams Jagdmann, on behalf of David M. Hicks, in his official capacity as Commonwealth's Attorney for the City of Richmond and Wade A. Kizer, in his official capacity as Commonwealth's Attorney for Henrico County (collectively "Virginia"), respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit. The court of appeals held that Virginia's Partial Birth Infanticide Act, *Virginia Code* § 18.2-71.1 ("Virginia Act"), was *facially* unconstitutional.

OPINIONS BELOW

The panel decision of the court of appeals is both published and reported as *Richmond Medical Center v. Hicks*, 409 F.3d 619 (4th Cir. 2005). It is reprinted in the Appendix at 1. The decision of the United States District Court for the Eastern District of Virginia is both published and reported as *Richmond Medical Center v. Hicks*, 301 F. Supp. 2d 499 (E.D. Va. 2004). It is reprinted in the Appendix at 60. The decision of the Fourth Circuit denying Virginia's Petition for Rehearing *En Banc* is both published and reported as *Richmond Medical Center v. Hicks*, 422 F.3d 160 (4th Cir. 2005). It is reprinted in the Appendix at 97.

JURISDICTION

The panel decision of the court of appeals was entered on June 3, 2005. The decision of the court of appeals

denying Virginia's Petition for Rehearing *En Banc* was entered on September 2, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED IN THIS CASE

This Petition involves Virginia's Partial Birth Infanticide Act, which provides:

> A. Any person who knowingly performs partial birth infanticide and thereby kills a human infant is guilty of a Class 4 felony.
>
> B. For the purposes of this section, "partial birth infanticide" means any deliberate act that (i) is intended to kill a human infant who has been born alive, but who has not been completely extracted or expelled from its mother, and that (ii) does kill such infant, regardless of whether death occurs before or after extraction or expulsion from its mother has been completed.
>
> The term "partial birth infanticide" shall not under any circumstances be construed to include any of the following procedures: (i) the suction curettage abortion procedure, (ii) the suction aspiration abortion procedure, (iii) the dilation and evacuation abortion procedure involving dismemberment of the fetus prior to removal from the body of the mother, or (iv) completing delivery of a living human infant and severing the umbilical cord of any infant who has been completely delivered.

Virginia Code § 18.2-71.1.

INTRODUCTION

This Petition involves the facial constitutionality of *Virginia Code* § 18.2-71.1, which prohibits partial birth infanticide.[1] Specifically, the Petition presents two questions:

1. When a statute regulates abortion, may federal courts allow a facial challenge alleging overbreadth?[2]

2. When a statute regulates partial birth abortion or similar abortion procedures, does the Constitution require that the statute contain a health exception?

Both questions are actually or effectively before this Court in other cases. In *Ayotte v. Planned Parenthood*, No. 04-1144, which was argued on November 30, this Court will decide the first question. Moreover, *Ayotte* presents the second question, but in the context of a parental notification statute rather than in the context of a statute regulating partial birth abortion or similar abortion procedures. Moreover, the United States Solicitor General's Petition for Certiorari in *Gonzales v. Carhart,* No. 05-380, which this Court will consider at its January 6, 2006

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[1] Because the lower courts concluded that the Virginia Act regulates abortion, Virginia uses the term "abortion" throughout this Petition. However, Virginia does not concede that the Virginia Act regulates "abortion." Rather, the Virginia Act – which exempts certain abortion procedures – regulates "infanticide."

[2] Of course, state courts may – as a matter of state law – decide whether to permit facial challenges alleging overbreadth in the context of abortion. *See Virginia v. Hicks,* 539 U.S. 113, 120 (2003) (noting that question of whether a litigant can bring an overbreadth claim in state court is a matter of state law).

Conference, presents the second question.[3] If this Court grants certiorari in *Gonzales*, it may wish to hold Virginia's Petition until both *Gonzales* and *Ayotte* are decided.[4] Alternatively, this Court may wish to grant this Petition as a means of clarifying the power of the States – rather than the power of the National Government – to regulate partial birth abortion or similar procedures.

STATEMENT OF THE CASE

1. In 2003, the Virginia General Assembly – in an attempt to further Virginia's important and legitimate interest in protecting the lives of children[5] – passed the Virginia Act, which prohibits the deliberate killing of a child once it is born alive, but "has not been completely

[3] Although the federal Partial Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531, and Virginia's statute are similar, there is one fundamental difference – the federal statute contains explicit findings by Congress that a health exception is unnecessary.

[4] If this Court ultimately concludes that federal courts may not permit facial challenges alleging overbreadth *or* that no health exception is required, then the appropriate course would be to grant certiorari, vacate the judgment, and remand to the court of appeals for further proceedings. Alternatively, if this Court concludes that federal courts may permit facial challenges alleging overbreadth *and* that the Constitution requires a health exception, then the appropriate course would be to deny certiorari.

[5] As this Court observed, "it must be remembered that *Roe v. Wade* speaks with clarity in establishing not only the woman's liberty but also the State's 'important and legitimate interest in potential life.' That portion of the decision in *Roe* has been given too little acknowledgment and implementation by the Court in its subsequent cases." *Planned Parenthood v. Casey*, 505 U.S. 833, 871 (1992) (citation omitted).

extracted or expelled from its mother."[6] *Virginia Code* § 18.2-71.1. In enacting this statute, the Virginia General Assembly was guided by the opinions in *Stenberg v. Carhart*, 530 U.S. 914 (2000).[7] Unlike the *Nebraska Revised Statutes* §§ 28-326 and 28-328(1) ("Nebraska Act"), which was at issue in *Stenberg*, the Virginia Act expressly

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[6] In specific cases, the killing acts prohibited by the Virginia Act may include the fatal fourth step in the so-called "D&X" abortion procedure as defined by the American College of Obstetrics and Gynecology as "partial evacuation of the intracranial contents of a living fetus to effect vaginal delivery of a dead but otherwise intact fetus." American College of Obstetricians and Gynecologists Executive Board, *Statement on Intact Dilation and Extraction* (1997). Whether the Virginia Act would apply in such a case depends on whether a substantial portion of the child (as defined in the Virginia Act) is outside the body of the mother when the physician undertakes the fatal step.

[7] In *Stenberg*, this Court focused on the broad nature of the Nebraska statute. It noted that the Nebraska statute:

> does not track the medical differences between D&E and D&X – though it would have been a simple matter, for example, to provide an exception for the performance of D&E and other abortion procedures. Nor does the statute anywhere suggest that its application turns on whether a portion of the fetus' body is drawn into the vagina as part of a process to extract an intact fetus after collapsing the head as opposed to a process that would dismember the fetus.

530 U.S. at 939 (citation omitted). Similarly, Justice O'Connor observed that:

> unlike Nebraska, some other States have enacted statutes more narrowly tailored to proscribing the D&X procedure alone. Some of those statutes have done so by specifically excluding from their coverage the most common methods of abortion, such as the D&E and vacuum aspiration procedures. . . . By restricting their prohibitions to the D&X procedure exclusively, the Kansas, Utah, and Montana statutes avoid a principal defect of the Nebraska law.

Id. at 950 (O'Connor, J., concurring).

exempts certain abortion procedures.[8] Moreover, a careful comparison of the Nebraska Act and the Virginia Act demonstrates that there are substantial differences.[9] Those substantial differences have constitutional significance.

[8] The statute provides:

> The term "partial birth infanticide" shall not under any circumstances be construed to include any of the following procedures: (i) the suction curettage abortion procedure, (ii) the suction aspiration abortion procedure, (iii) the dilation and evacuation abortion procedure involving dismemberment of the fetus prior to removal from the body of the mother, or (iv) completing delivery of a living human infant and severing the umbilical cord of any infant who has been completely delivered.

Virginia Code § 18.2-71.1(B).

[9] The following table comparing the Nebraska Act with the Virginia Act illustrates the significant differences.

Nebraska Revised Statutes **§§ 28-326 and 28-328(1)**	***Virginia Code*** **§ 18.2-71.1**
"abortion"	"infanticide"
"partially delivers"	"born alive"
Requires only that the unborn child is "living." No evidence that the unborn child is living is required.	Specifically states that a human infant has been born alive when he "shows any other evidence of life such as beating of the heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, whether or not the umbilical cord has been cut or the placenta is attached."

2. Although adopted by the People's democratically elected representatives, the statute never took effect and,

***Nebraska Revised Statutes* §§ 28-326 and 28-328(1)**	***Virginia Code* § 18.2-71.1**
Requires delivery of a "substantial" portion of the child. Does not state when delivery of a substantial portion occurs.	Clearly addresses the exact point at which birth occurs for purposes of the statute. Birth occurs when the child is substantially expelled or extracted from its mother. Substantially expelled or extracted from its mother means, in the case of a headfirst presentation, the infant's entire head is outside the body of the mother, or, in the case of breech presentation, any part of the infant's trunk past the navel is outside the body of the mother.
Provides no exceptions for other abortion procedures.	Exempts the following procedures from prosecution under the Act: 1) the suction curettage abortion procedure, 2) the suction aspiration abortion procedure, 3) the dilation and evacuation abortion procedure involving dismemberment of the fetus prior to removal from the body of the mother, or 4) completing delivery of a living human infant and severing the umbilical cord of any infant who has been completely delivered.
Automatic revocation of doctor's license to practice medicine.	No automatic revocation; allows physician to defend on grounds of health and safety of mother (e.g. emergency threatened mother's life).

thus, has never been applied to anyone. The Respondents, Richmond Medical Center for Women and Dr. William Fitzhugh (collectively "Dr. Fitzhugh") filed this action in the district court seeking a preliminary and permanent injunction shortly before the July 1, 2003 effective date for the Virginia Act. The district court granted a preliminary injunction and, following discovery, granted summary judgment to Dr. Fitzhugh. *App.* at 95. Specifically, the district court found that *Stenberg* established a *per se* constitutional rule that all abortion statutes must have a health exception. *App.* at 87. Because the Virginia Act does not have a health exception, the district court concluded that it is unconstitutional. *App.* at 85-86, 88. In addition, the district court found that: (1) the Virginia Act imposed an undue burden on a woman's right to obtain an abortion, *App.* at 90-91; (2) the Virginia Act's "life exception" was inadequate, *App.* at 91; (3) the Virginia Act bans medical procedures other than abortion, *App.* at 92; and (4) the Virginia Act is unconstitutionally vague, *App.* at 92-94.

3. On appeal, a sharply divided panel of the Fourth Circuit affirmed the judgment that the Virginia Act is *facially* unconstitutional.

a. First, relying on *Stenberg* and *Casey*, the lower court concluded that, when a statute regulates abortion, facial challenges alleging overbreadth are permitted. *App.* at 18. The Fourth Circuit also stated that circuit precedent did not foreclose facial challenges alleging overbreadth in the abortion context. *App.* at 18-20. Moreover, the court of appeals found that *Sabri v. United States,* 541 U.S. 600, 609-10 (2004), "puts the issue to rest by recognizing the appropriateness of facial challenges alleging overbreadth in the regulation of abortion." *App.* at 20.

b. Second, reading *Stenberg* expansively, the Fourth Circuit concluded that when a statute regulates abortion, the Constitution mandates that it include a health exception. *App.* at 22. In other words, once the statute at issue is labeled as an "abortion" statute like the one at issue in *Stenberg*, the actual risks, if any, created by the statute and the extent of medical authority, if any, supporting the existence of such risks, will be irrelevant. Because the lower court erroneously held that all statutes regulating partial birth abortion or similar procedures must have a health exception, and because the Virginia Act does not have a health exception, the court of appeals invalidated the Virginia Act. Having done so, the Fourth Circuit refused to consider Virginia's other arguments. *App.* at 22 n.2.

c. Judge Niemeyer dissented from both holdings. First, he noted that, under existing Fourth Circuit precedent, a facial challenge alleging overbreadth is not permitted in the abortion context. *App.* at 23, 34-38 (Niemeyer, J., dissenting). Second, as to whether *Stenberg* establishes a *per se* rule that a health exception is required, Judge Niemeyer observed, "Nothing in [*Stenberg*] . . . indicates that the Court was creating a *per se* constitutional rule or that every abortion statute, regardless of whether it targets methods of abortion or the life of the fetus . . . must contain" a health exception. *App.* at 28 (Niemeyer, J., dissenting). Furthermore, Judge Niemeyer noted that – at least with respect to the procedures performed by Dr. Fitzhugh – there was never a need for a health exception. *App.* at 44 (Niemeyer, J., dissenting).

4. The Commonwealth petitioned for rehearing *en banc*. The petition was denied by a vote of 10-2 with Judge Williams not participating. Judge Michael wrote a concurring

opinion reiterating the reasoning of the panel majority. *App.* at 101-03 (Michael, J., concurring in the denial of rehearing *en banc*). Judges Wilkinson and Luttig wrote separate concurring opinions indicating that they believed that *Stenberg* compelled the result. *App.* at 100-01 (Wilkinson, J., concurring in the denial of rehearing *en banc*); *App.* at 101 (Luttig, J., concurring in the denial of rehearing *en banc*). Judge Niemeyer, joined by Judge Widener, dissented and reiterated the reasoning stated in his original panel dissent. *App.* at 103-07 (Niemeyer, J., joined by Widener, J., dissenting from the denial of rehearing *en banc*). This Petition for a Writ of Certiorari followed.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for two reasons. First, review should be granted to determine whether a federal court may allow overbreadth challenges to abortion statutes. The Circuits are divided on this question. Moreover, the issue has significant ramifications for this Court's abortion jurisprudence. Additionally, the issue has profound implications for this Court's exercise of the power of judicial review.

Second, review should be granted to determine whether the Constitution requires that the Virginia Act contain a health exception. Essentially, this question calls for an interpretation of *Stenberg*. The lower courts have concluded that *Stenberg* mandates a health exception whenever a statute regulates abortion. However, a careful reading of *Stenberg* indicates that this Court did not adopt so far-reaching a *per se* constitutional rule.

I. REVIEW SHOULD BE GRANTED TO DETERMINE IF FEDERAL COURTS MAY ALLOW OVERBREADTH CHALLENGES TO ABORTION STATUTES.

A facial challenge is "a claim that [a] law is 'invalid *in toto* – and therefore incapable of any valid application.'" *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982). Because a facial challenge seeks to invalidate the results of the democratic process, this Court generally requires that "the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). However, in the First Amendment, U.S. Const. amend. I, context, this Court relaxes that standard and will invalidate a law on its face because it is unconstitutional in *many*, but not all, of its applications. As this Court explained:

> The First Amendment doctrine of overbreadth is an exception to our normal rule regarding the standards for facial challenges. The showing that a law punishes a "substantial" amount of protected speech, "judged in relation to the statute's plainly legitimate sweep," suffices to invalidate *all* enforcement of that law, "until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression". . . .

Hicks, 539 U.S. at 118-19 (citations omitted). *See also Virginia v. Black*, 538 U.S. 343, 375 (2003) (Scalia, J., dissenting) (similar explanation of overbreadth in the First Amendment context). This Court has created "this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or "chill"

constitutionally protected speech – especially when the overbroad statute imposes criminal sanctions." *Hicks*, 539 U.S. at 119 (citations omitted).

To date, this Court has never allowed facial challenges alleging overbreadth outside of the First Amendment context.[10] Indeed, this Court has explicitly applied the *Salerno* "no set of circumstances" test in the abortion context. *Ohio v. Akron Ctr. for Reproductive Health*, 497 U.S. 502, 514 (1990) (statute requiring parental notification). *See also Webster v. Reproductive Health Servs.*, 492 U.S. 490, 523-24 (1989) (O'Connor, J., concurring) (statute prohibiting use of public facilities for performing abortions). Nevertheless, the lower court concluded that, in the abortion context, federal courts are required to entertain facial challenges alleging overbreadth. *App.* at 20.

A. The Circuits Are Divided.

The Circuits are divided on the question of whether the federal courts may allow facial challenges alleging overbreadth to abortion statutes. The Fifth Circuit has

[10] Of course, this Court recently suggested that it had allowed facial challenges alleging overbreadth in contexts other than the First Amendment. *Sabri*, 541 U.S. at 609-10 ("[W]e have recognized the validity of facial attacks alleging overbreadth (though not necessarily using that term) in relatively few settings, and, generally, on the strength of specific reasons weighty enough to overcome our well-founded reticence."). However, a careful examination of the cases listed in *Sabri* indicates that they did not involve "overbreadth" in the traditional sense, but instead involved statutes that were invalid in all of their applications under the relevant standards for evaluating the *merits* of the underlying constitutional claims. *See generally* Brief of the United States as Amicus Curiae at 13, *Ayotte v. Planned Parenthood*, (Aug. 2005) (No. 04-1444).

held that such challenges are not permitted. *See Barnes v. Moore,* 970 F.2d 12, 14 n.2 (5th Cir. 1992). *See also Causeway Med. Suite v. Ieyoub,* 109 F.3d 1096, 1102-03 (5th Cir. 1997) (declining to reverse *Barnes*). Moreover, prior to its opinion in *this* case, the Fourth Circuit refused to allow facial challenges alleging overbreadth in the abortion context. *See Greenville Women's Clinic v. Bryant,* 317 F.3d 357, 362-63 (4th Cir. 2004) (*Greenville Women's Clinic II*); *Greenville Women's Clinic v. Bryant,* 222 F.3d 157, 164-65 (4th Cir. 2000) (*Greenville Women's Clinic I*); *Manning v. Hunt,* 119 F.3d 254, 268-69 (4th Cir. 1997). However, other Circuits have concluded that facial challenges alleging overbreadth are permitted in the abortion context. *See Planned Parenthood v. Heed,* 390 F.3d 53, 58 (1st Cir. 2004), *cert. granted sub nom. Ayotte v. Planned Parenthood,* 125 S. Ct. 2294 (2005); *Planned Parenthood v. Farmer,* 220 F.3d 127, 142-43 (3rd Cir. 2000); *Planned Parenthood v. Lawall,* 180 F.3d 1022, 1025-26 (9th Cir.), *amended on denial of reh'g,* 193 F.3d 1042 (9th Cir. 1999); *Women's Med. Prof'l Corp. v. Voinovich,* 130 F.3d 187, 193-96 (6th Cir. 1997); *Jane L. v. Bangerter,* 102 F.3d 1112, 1116 (10th Cir. 1996); *Planned Parenthood v. Miller,* 63 F.3d 1452, 1456-58 (8th Cir. 1995). *Cf. A Woman's Choice-East Side Women's Clinic v. Newman,* 305 F.3d 684, 687 (7th Cir. 2002) (treating the *Salerno* standard as merely a "suggestion" in the abortion context). Because the conflict among the Circuits must be resolved, certiorari should be granted.

B. The Issue Has Significant Ramifications for This Court's Abortion Jurisprudence.

In addition to dividing the Circuits, the question of whether to allow an overbreadth challenge in the abortion

context has significant ramifications for this Court's abortion jurisprudence. The ramifications manifest themselves in two ways.

First and most obviously, resolution of this issue will determine whether most abortion statutes are facially unconstitutional or, at worst, unconstitutional as applied to the litigants challenging the abortion statutes. Quite simply, most abortion statutes, including the Virginia Act, have at least some constitutional applications.[11] For example, if a woman carried her child to full term and then, right after the head was delivered, someone beheaded or strangled the child in order to terminate the pregnancy, there would be a violation of the Virginia Act.[12] Such an application of the Virginia Act would be constitutional.

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[11] Indeed, a statute that banned all abortions under all circumstances would be constitutional as applied to a woman in the early stages of full term labor.

[12] Such a scenario is not conjecture. News reports describe a spate of instances in which unmarried teenagers attempt to kill their newborn, unwanted babies. *See Newborn Found Dead Near Waco Creek*, AP STATE AND LOCAL WIRE, Dec. 31, 2002; *Dead Fetus, Abandoned by Mom, Found in Movie Theatre Toilet in Loliette, Que.*, THE CANDIAN PRESS, Jan. 8, 2003 *available at* LEXIS, News Group File; *Grave Near Fort Chaffee Yields Body of Baby Girl*, ARK. DEM. GAZ., Feb. 1, 2003; Naush Boghossian, *Baby Found Dead in Bin*, DAILY NEWS OF L.A., Feb. 5, 2003 *available at* LEXIS, News Group File; Naush Boghossian, *Drug Tests Planned on Dead Newborn*, DAILY NEWS OF L.A., Feb. 12, 2003; Tom Spalding, *Autopsy Does Little to Help Police Learn about Newborn's Death*, INDIANAPOLIS STAR, Dec. 11, 2001 *available at* LEXIS, News Group File; John Marzulli, *Baby Found Dead in Herald Sq.*, N.Y. DAILY NEWS, Oct. 12, 1999 *available at* LEXIS, Major Newspapers File; *Queens Bldg. Super Finds Newborn's Body in Bag*, N.Y. DAILY NEWS, Feb. 15, 2000 *available at* LEXIS, Major Newspapers File; Melanie Lefkowitz, *Dead Baby Found in a Bronx Lot*, NEWSDAY (N.Y.), Mar. 27, 2001 *available at* LEXIS, Major Newspapers File; Akilah Johnson and Shana Gruškin, *Baby's Body*

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Second and perhaps less obviously, resolution of this issue will determine exactly who has standing to challenge abortion regulations. The overbreadth doctrine has a standing component as well. *See Hicks*, 539 U.S. at 120. Indeed, the issue of whether the overbreadth doctrine applies determines *who* can challenge a particular statute. To explain, a person generally may challenge a statute as it applies to their own conduct, but "may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." *New York v. Ferber*, 458 U.S. 747, 767 (1982). Thus, unless a litigant actually violates the statute at issue, the litigant may not challenge that statute. However, the general rule gives way in a few limited situations where the overbreadth doctrine applies. *See Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). In those limited contexts, a litigant may vindicate the rights of others even though the litigant himself may not have violated the statute at issue.

The distinction is critical in abortion cases. If facial challenges alleging overbreadth are not permitted, then the litigant challenging an abortion statute must demonstrate that he actually engages in conduct that violates the abortion statute at issue. In contrast, if facial challenges alleging overbreadth are permitted, then no such limitation exists. The present case demonstrates the importance of this distinction. On this record, there is serious doubt that Dr. Fitzhugh actually performs procedures which violate the Virginia Act.[13] If overbreadth challenges are not

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Found in Trash; Miami Newborn was Put in Bin at Luxury Condo, SUN-SENTINEL, Apr. 19, 2001.

[13] In order to violate the Act, Dr. Fitzhugh must: (1) perform a procedure described by the Virginia Act; and (2) do so in circumstances

(Continued on following page)

permitted, Dr. Fitzhugh may lack standing to challenge the Virginia Act. Alternatively, if overbreadth challenges are permitted, then Dr. Fitzhugh may bring this challenge to vindicate the rights of other doctors who may actually perform acts that violate the Virginia Act.

Because the issue of whether to allow an overbreadth challenge in the abortion context has significant ramifications for this Court's abortion jurisprudence, certiorari should be granted.

C. The Issue Has Profound Implications for this Court's Exercise of the Power of Judicial Review.

In addition to dividing the Circuits and having significant ramifications for this Court, the question of whether to allow an overbreadth challenge in the abortion context

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where the Virginia Act's life exception is inapplicable. On this record, there is serious doubt as to whether Dr. Fitzhugh can make this showing. Dr. Fitzhugh admits that he does not dismember any part of a fetus that passes intact outside the body of the mother during an abortion procedure. *App.* at 50 (Niemeyer, J., dissenting). He also concedes that in the case of a vertex or headfirst delivery where the fetus is delivered intact and substantially outside the mother's body, it is not necessary to kill the fetus to protect the health of the mother. *App.* at 41 (Niemeyer, J., dissenting).

Moreover, Dr. Fitzhugh concedes that in the case of a breech or feet first delivery, there is generally no need to kill the fetus to protect the health of the mother. It is only the rare circumstance where the head becomes lodged in the cervical os, which "poses a threat to the mother's *life*, and to abate that risk, Dr. Fitzhugh prefers to crush the skull of the fetus and then remove it." *App.* at 43 (Niemeyer, J., dissenting). In this circumstance, however, Dr. Fitzhugh concedes that the mother's life would be at risk and thus covered by the life exception. Therefore, there would be no need for a health exception. *App.* at 44 (Niemeyer, J., dissenting).

has profound implications for this Court's exercise of the power of judicial review.

Because the determination of the constitutionality of a legislative act is "the gravest and most delicate duty that this Court is called upon to perform," *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981), this Court has recognized that it "has no jurisdiction to pronounce any statute . . . void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies."[14] *Liverpool, N.Y. & Philadelphia S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885). Indeed, if, as Tocqueville suggested, every political issue becomes a constitutional question, *see* Alexis de Tocqueville, *Democracy In America*, 126 (Richard Hefner, ed., Mentor Books 1984) (1835), then there is a danger that this Court will be transformed into a "bevy of platonic guardians" who constantly substitute their judgment for the policy choices of elected officials. *See Griswold v. Connecticut*, 381 U.S. 479, 526 (1965) (Black, J., dissenting) (quoting Learned Hand, *The Bill of Rights* 73 (1958)). Thus, while this Court has carefully guarded its role as the ultimate interpreter of the Constitution, *see Cooper v. Aaron*, 358 U.S. 1, 18 (1958), it has refused to "frustrate the expressed will of Congress or that of the state legislatures" *Barrows v. Jackson*, 346 U.S. 249, 256-57 (1953), by passing on the constitutionality of "hypothetical cases thus imagined." *United States v. Raines*, 362 U.S. 17, 22 (1960).

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[14] Of course, *Rostker* arose in the context of a challenge to an act of Congress, rather than an act of a state legislature. Nevertheless, given the essential role of the States in our constitutional system, *see Federal Mar. Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 751-52, 769 (2002), a constitutional challenge to a state statute is no less grave or delicate.

See also Erznoznik v. City of Jacksonville, 422 U.S. 205, 216 (1975). ("[W]hen considering a facial challenge it is necessary to proceed with caution and restraint, as invalidation may result in unnecessary interference with a state regulatory program."). *Cf.* John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review*, 4-5 (1982) (noting that the existence of judicial review reflects a fundamental distrust of the democratic process). Moreover, when confronted with the constitutionality of a *state* statute, this Court has been hesitant to invalidate a statute on its face until "state courts [have] the opportunity to construe [the statute] to avoid constitutional infirmities." *Ferber*, 458 U.S. at 768.

Indeed, a proper respect for the democratic process and for the principles of judicial restraint may well prohibit this Court from ever entertaining a facial challenge alleging overbreadth. Perhaps, all constitutional challenges should be limited to as-applied challenges. *See City of Chicago v. Morales*, 527 U.S. 41, 77 (1999) (Scalia, J., dissenting).[15] However, regardless of whether this Court

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[15] As Justice Scalia explained:

> It seems to me fundamentally incompatible with [the constitutional] system for the Court not to be content to find that a statute is unconstitutional as applied to the person before it, but to go further and pronounce that the statute is unconstitutional in *all* applications. Its reasoning may well suggest as much, but to pronounce a *holding* on that point seems to me no more than an advisory opinion – which a federal court should never issue at all, and *especially* should not issue with regard to a constitutional question, as to which we seek to avoid even *non* advisory opinions. I think it quite improper, in short, to ask the constitutional claimant before us: Do you just want us to say that this statute cannot constitutionally be applied to you in this case, or do

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should continue to entertain facial challenges alleging overbreadth in the First Amendment context, it should certainly be reluctant to expand the circumstances in which it allows such challenges. The issue of whether such challenges should be allowed in the context of abortion statutes is really a question of whether this Court will engage in the wholesale invalidation of the States' efforts to regulate abortion in the abstract or will simply confine its review to a particular fact situation. Certiorari should be granted.

II. CERTIORARI SHOULD BE GRANTED TO DETERMINE IF THE CONSTITUTION REQUIRES A HEALTH EXCEPTION.

Regardless of whether this Court grants certiorari to determine if federal courts may entertain facial challenges alleging overbreadth in the abortion context, this Court should grant review to determine if the Constitution imposes a *per se* rule that a health exception must be included in any statute that regulates partial birth abortion or similar procedures. This is an important federal question that has not been, but ought to be, decided by this Court.

This issue of whether the Constitution mandates a health exception is fundamentally a question of how to interpret *Stenberg*. The panel majority believed that:

> you want to go for broke and try to get the statute pronounced void in all its applications?

Morales, 541 U.S. at 77 (Scalia, J., dissenting) (citations omitted, emphasis original).

> [*Stenberg*] established the health exception requirement as a *per se* constitutional rule. This rule is based on substantial medical authority (from a broad array of sources) recognized by the Supreme Court, and this body of medical authority does not have to be reproduced in every subsequent challenge to a "partial birth abortion" statute lacking a health exception.

App. at 14. Other lower federal courts have reached a similar conclusion. *See Heed,* 390 F.3d at 59-60; *Planned Parenthood v. Wasden,* 376 F.3d 908, 922 (9th Cir. 2004); *Women's Med. Prof'l Corp. v. Taft,* 353 F.3d 436, 444-45 (6th Cir. 2003); *A Woman's Choice,* 305 F.3d at 688; *Planned Parenthood v. Owens,* 287 F.3d 910, 917-18 (10th Cir. 2002); *Reproductive Health Servs. of Planned Parenthood v. Nixon,* 325 F. Supp. 2d 991, 994-95 (W.D. Mo. 2004); *Planned Parenthood Fed'n of America v. Ashcroft,* 320 F. Supp. 2d 957, 1013 (N.D. Cal. 2004); *WomanCare, P.C. v. Granholm,* 143 F. Supp. 2d 849, 855 (E.D. Mich. 2001); *Summit Med. Assocs. v. Siegelman,* 130 F. Supp. 2d 1307, 1309, 1314 (M.D. Ala. 2001); *Daniel v. Underwood,* 102 F. Supp. 2d 680, 681, 684 (S.D. W.Va. 2000). Under such a *per se* rule, once it is established that a statute regulates abortion, the actual risks, if any, created by the statute and the extent of medical authority, if any, supporting the existence of such risks, are irrelevant. The only consideration is whether the abortion statute has a health exception.

However, there is an alternative interpretation of *Stenberg.* As Judge Niemeyer explained, the panel majority's interpretation of *Stenberg*:

> loses focus of the protection being implemented there. As the [*Stenberg*] Court said, "We shall not

> revisit those legal principles [providing basic protection to the mother's right to choose]. Rather, we apply them *to the circumstances of this case*." And, of course, the Court thus rendered its holding on the underlying principle being implemented: that a State cannot "interfere with a woman's choice to undergo an abortion procedure *if continuing her pregnancy would constitute a threat to her health*."

App. at 28 (Niemeyer, J., dissenting) (emphasis original) (citations omitted). In other words, *Stenberg* only requires a health exception where substantial medical authority supports the need for the exception in light of the *particular abortion procedure* that the Virginia Act prohibits. Indeed, this Court itself stated:

> By no means must a State grant physicians "unfettered discretion" in their selection of abortion methods. But where substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women's health, *Casey* requires the statute to include a health exception when the procedure is "'necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.'" Requiring such an exception in this case is no departure from *Casey*, but simply a straightforward application of its holding.

Stenberg, 530 U.S. at 938 (emphasis added) (citations omitted). Thus, there is no bright-line rule that a health exception is always required. Indeed, if this Court had meant for *Stenberg* to establish a bright-line rule that a health exception is required for all abortion statutes, then this Court's analysis of the Nebraska legislature's "findings and evidence" would have been entirely unnecessary.

See id. at 932. Rather, whether a health exception is required depends upon the nature of the abortion procedure being regulated or, stated another way, the facts of each particular case.[16]

While Virginia believes that Judge Niemeyer's interpretation of *Stenberg* is correct, there is an obvious need for this Court to determine which interpretation is correct. Legislative bodies that wish to regulate abortion in general and partial birth abortion in particular need to know whether a health exception is required. Certiorari should be granted.

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[16] Of course, it may be that there is substantial medical authority that would require a health exception for the Virginia Act. However, Dr. Fitzhugh did not offer "substantial medical authority for the proposition that a health exception is needed in this particular statute." *App.* at 24. "The record demonstrates that a genuine issue of material fact exists as to whether substantial medical authority in fact supports the proposition" that prohibiting physicians from intentionally killing a fetus by collapsing or crushing the skull when the fetus is substantially outside the mother's body "would endanger the health of a woman. In these circumstances, summary judgment cannot be granted." *App.* at 44 (Niemeyer, J., dissenting).

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be **GRANTED**.

Respectfully submitted,

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APPENDIX

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RICHMOND MEDICAL CENTER FOR WOMEN; WILLIAM G. FITZHUGH, M.D., on behalf of themselves, their staffs, and their patients,

Plaintiffs-Appellees,

v.

DAVID M. HICKS, in his official capacity as Commonwealth Attorney for the City of Richmond; WADE A. KIZER, in his official capacity as Commonwealth Attorney for the County of Henrico,

Defendants-Appellants.

No. 03-1821

HORATIO R. STORER FOUNDATION, INCORPORATED,

Amicus Supporting Appellants,

and

PHYSICIANS FOR REPRODUCTIVE CHOICE AND HEALTH; VANESSA E. CULLINS, Vice President for Medical Affairs, Planned Parenthood Federation of America; FORTY-TWO INDIVIDUAL PHYSICIANS,

Amici Supporting Appellees.

RICHMOND MEDICAL CENTER FOR WOMEN; WILLIAM G. FITZHUGH, M.D., on behalf of themselves, their staffs, and their patients,

Plaintiffs-Appellees,

v.

DAVID M. HICKS, in his official capacity as Commonwealth Attorney for the City of Richmond; WADE A. KIZER, in his official capacity as Commonwealth Attorney for the County of Henrico,

Defendants-Appellants.

No. 04-1255

HORATIO R. STORER FOUNDATION, INCORPORATED,

Amicus Supporting Appellants,

and

PHYSICIANS FOR REPRODUCTIVE CHOICE AND HEALTH; VANESSA E. CULLINS, Vice President for Medical Affairs, Planned Parenthood Federation of America; FORTY-TWO INDIVIDUAL PHYSICIANS,

Amici Supporting Appellees.

Appeals from the United States District Court for the Eastern District of Virginia, at Richmond. Richard L. Williams, Senior District Judge. (CA-03-531-3)

Argued: October 26, 2004

Decided: June 3, 2005

Before NIEMEYER, MICHAEL, and MOTZ, Circuit Judges.

Affirmed by published opinion. Judge Michael wrote the majority opinion, in which Judge Motz joined. Judge Niemeyer wrote a dissenting opinion.

COUNSEL

ARGUED: William Eugene Thro, Deputy State Solicitor, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, for Appellants. Suzanne Novak, CENTER FOR REPRODUCTIVE LAW AND POLICY, New York, New York, for Appellees. **ON BRIEF:** Jerry W. Kilgore, Attorney General of Virginia, Judith Williams Jagdmann, Deputy Attorney General, David E. Johnson, Deputy Attorney General, Edward M. Macon, Senior Assistant Attorney General, James C. Stuchell, Assistant Attorney General, Anthony P. Meredith, Assistant Attorney General, Richmond, Virginia, for Appellants. Priscilla J. Smith, CENTER FOR REPRODUCTIVE LAW AND POLICY, New York, New York, for Appellees. James Bopp, Jr., Richard E. Coleson, Thomas J. Marzen, Jeffrey P. Gallant, BOPP, COLESON & BOSTROM, Terre Haute, Indiana, for Amicus Supporting Appellants. David S. Cohen, WOMEN'S LAW PROJECT, Philadelphia, Pennsylvania; Susan Frietsche, Stacey I. Young, WOMEN'S LAW PROJECT, Pittsburgh, Pennsylvania, for Amici Supporting Appellees.

OPINION

MICHAEL, Circuit Judge:

This case involves a facial challenge under the Fourteenth Amendment to a Virginia statute that attempts to criminalize "partial birth abortion," which the statute terms "partial birth infanticide." In a summary judgment order the district court declared the statute invalid for several reasons. We affirm because it lacks an exception to protect a woman's health.

I.

A.

Chapters 961 and 963 of the 2003 Acts of the Virginia General Assembly ("the Act") make it a Class 4 felony for a person to knowingly perform "partial birth infanticide." Va. Code Ann. § 18.2-71.1. A Class 4 felony in Virginia is punishable by a prison term of up to ten years and a fine of up to $100,000. *Id.* § 18.2-10. The Act defines "partial birth infanticide" as

> any deliberate act that (i) is intended to kill a human infant who has been born alive, but who has not been completely extracted or expelled from its mother, and that (ii) does kill such infant, regardless of whether death occurs before or after extraction or expulsion from its mother has been completed.

Id. § 18.2-71.1(B). The phrase "human infant who has been born alive" is defined as

> a product of human conception that has been completely or substantially expelled or extracted from its mother, regardless of the duration of pregnancy, which after such expulsion or extraction breathes or shows any other evidence of life such as beating of the heart, pulsation of the

> umbilical cord, or definite movement of voluntary muscles, whether or not the umbilical cord has been cut or the placenta is attached.

Id. § 18.2-71.1(C). The Act defines the phrase "substantially expelled or extracted from [the] mother" as (i) when "the infant's entire head is outside the body of the mother" in the case of a headfirst presentation, or (ii) when "any part of the infant's trunk past the navel is outside the body of the mother" in the case of a breech presentation. *Id.* § 18.2-71.1(D). The Act provides the following exception to the general prohibition:

> This section shall not prohibit the use by a physician of any procedure that, in reasonable medical judgment, is necessary to prevent the death of the mother, so long as the physician takes every medically reasonable step, consistent with such procedure, to preserve the life and health of the infant. A procedure shall not be deemed necessary to prevent the death of the mother if completing the delivery of the living infant would prevent the death of the mother.

Id. § 18.2-71.1(E). The Act's ban of certain abortion procedures does not provide an exception for instances in which an otherwise banned procedure is necessary, in appropriate medical judgment, to preserve a woman's health. Indeed, the Virginia General Assembly rejected proposed amendments that would have provided a statutory exception for some circumstances when a woman's health was at risk. *See Richmond Med. Ctr. for Women v. Hicks,* 301 F. Supp. 2d 499, 502 (E.D. Va. 2004). The General Assembly failed to include a health exception even though an earlier Virginia statute banning late-term abortions was struck down because it lacked an exception for instances when continuation of a pregnancy poses a threat to a

woman's health. *See Richmond Med. Ctr. for Women v. Gilmore,* 224 F.3d 337, 339 (4th Cir. 2000). The Virginia House of Delegates also rejected proposed amendments that would have limited the Act's prohibition to postviability abortions. *See Hicks,* 301 F. Supp. 2d at 502.

The Act challenged in this case excludes the following from the definition of "partial birth infanticide":

> (i) the suction curettage abortion procedure, (ii) the suction aspiration abortion procedure, (iii) the dilation and evacuation [(D&E)] abortion procedure involving dismemberment [(disarticulation)] of the fetus prior to removal from the body of the mother, [and] (iv) completing delivery of a living human infant and severing the umbilical cord of any infant who has been completely delivered.

Va. Code Ann. § 18.2-71.1(B). By excepting only a single variant of the D&E procedure, that involving fetal disarticulation prior to removal from the woman's body, the Act prohibits all other D&E variations meeting the statutory definition of "partial birth infanticide." One prohibited variant is the intact D&E, which does not involve disarticulation and in which the fetus is removed from the uterus through the cervix in one pass rather than several. Depending on the presentation of the fetus, an intact D&E proceeds in one of two ways. In the case of a vertex presentation, the physician collapses the fetal calvarium and then extracts the entire fetus through the cervix. In the case of a breech presentation, the physician pulls the fetal trunk through the cervix, collapses the fetal calvarium, and then completes extraction of the fetus through the cervix. A second variation prohibited by the Act is the dilation and extraction (D&X) procedure, which is similar

to the breech extraction variant of the intact D&E in all material respects except that it involves the intentional repositioning of the fetus to a breech presentation. Because the intact D&E and D&X procedures are so similar, they are often referred to inter-changeably. A third variation prohibited by the Act involves the D&E in which fetal disarticulation occurs outside of the woman's body. Disarticulation generally occurs beyond the cervical os (the lower portion, or opening, of the cervix) as a result of traction against the cervix. However, disarticulation may occur outside of the woman's body when there is little or no space between the cervical os and the vaginal introitus (the vaginal canal) or when the cervical os prolapses (emerges) outside the vaginal introitus. (The Act also criminalizes the treatment of certain incomplete miscarriages.)

Plaintiff William G. Fitzhugh, M.D. is a board certified obstetrician and gynecologist who is licensed to practice medicine in Virginia. Dr. Fitzhugh performs abortions through twenty weeks of pregnancy; he therefore does not perform any postviability abortions. Some of the abortions he performs, particularly intact D&Es and D&Es in which fetal disarticulation occurs outside of the woman's body, are prohibited by the Act. Dr. Fitzhugh performs some of these abortions on the premises of plaintiff Richmond Medical Center for Women (RMCW) where he is Medical Director.

B.

The Act was scheduled to take effect on July 1, 2003. On June 18, 2003, RMCW and Dr. Fitzhugh filed a complaint against two Commonwealth's Attorneys ("the

Commonwealth") in the United States District Court for the Eastern District of Virginia, challenging the Act's constitutionality and seeking declaratory and injunctive relief to block its enforcement. The court granted the plaintiffs' motion for a preliminary injunction against enforcement of the Act on July 1, 2003. After the parties engaged in discovery, the plaintiffs filed a motion for summary judgment on September 25, 2003. On February 4, 2004, the district court granted summary judgment to the plaintiffs, declaring the Act unconstitutional and permanently enjoining its enforcement. *See Hicks*, 301 F. Supp. 2d at 517-18. The court held the Act facially invalid under the Fourteenth Amendment for several independent reasons: (1) it lacks an exception to protect a woman's health, (2) it places an undue burden on a woman's right to decide to have an abortion, (3) its life exception is inadequate, (4) it bans – in the absence of a compelling state interest – other safe gynecological procedures such as those used in certain miscarriage presentations, and (5) it is unconstitutionally vague. *Id.* at 513-17. In its order awarding summary judgment, the district court struck certain evidence proffered by the Commonwealth, specifically, the complete testimony of one expert, selected testimony of another expert, and several exhibits and other documents. The Commonwealth appeals.

II.

The Commonwealth argues that the district court erred when it granted summary judgment to the plaintiffs on the ground that the Act is unconstitutional because it lacks an exception for the preservation of a woman's health. Summary judgment "shall be rendered forthwith" when the proffered evidence "show[s] that there is no

genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). We conclude that the judgment of the district court must be affirmed because "the [Supreme] Court . . . unequivocally held [in *Stenberg v. Carhart*, 530 U.S. 914 (2000)] that any ban on partial-birth abortion must include an exception for the health of the mother in order to be constitutional." *Richmond Med. Ctr. for Women v. Gilmore*, 219 F.3d 376, 377 (4th Cir. 2000) (Luttig, J., concurring).

In *Carhart* the Court concluded that Nebraska's statutory ban on certain abortion procedures, including the intact D&E/D&X procedure, violated the federal Constitution for "at least two independent reasons." 530 U.S. at 930. The statute (1) imposed "an undue burden on a woman's ability to choose a D&E abortion, thereby unduly burdening the right to choose abortion itself" and (2) lacked "any exception for the preservation of the . . . health of the mother." *Id.* (internal quotation marks omitted). Thus, the lack of a health exception alone provides a sufficient basis for invalidating restrictions on a woman's right to have an abortion. The *Carhart* opinion explained that "the governing standard requires an exception 'where it is necessary, in appropriate medical judgment for the preservation of the life or health of the mother,' for this Court has made clear that a State may promote but not endanger a woman's health when it regulates the methods of abortion." *Id.* at 931 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 879 (1992)). Thus, a state cannot force women to use methods of abortion that present greater risks to their health than other available methods, *see id.*, regardless of whether the fetus has reached viability, *see id.* at 930 ("Since the law

requires a health exception in order to validate even a postviability abortion regulation, it at a minimum requires the same in respect to previability regulation.").

The State of Nebraska contended in *Carhart* that the intact D&E/D&X abortion procedure could be outlawed and that no health exception was necessary. The Supreme Court disagreed after conducting a wide-ranging review of medical authority evaluating the intact D&E/D&X procedure. In the course of its review, the Court supplemented the district court record with information from a significant array of medical sources. Extra-record sources considered by the Court included medical textbooks and journals relating to abortion, obstetrics, and gynecology; the factual records developed in prior "partial birth abortion" cases; and amicus briefs (with citations to medical authority) submitted on behalf of medical organizations. *See id.* at 923-29, 932-36.

Based on all of the information available, the Court concluded that substantial medical authority supports the proposition that the intact D&E/D&X procedure offers significant health and safety advantages over alternative methods of late-term abortion. First (and most important), the intact D&E/D&X procedure permits the fetus to pass through the cervix in one pass rather than several. *Id.* at 927. It therefore reduces operating time, blood loss, trauma, exposure to anesthesia, and the risk of infection; it also reduces the risk of (1) instrument-inflicted damage to the uterus and cervix and (2) injury from sharp fetal bone fragments. *Id.* at 932, 936. Second, the procedure prevents the most common causes of maternal mortality (disseminated intravascular coagulation and amniotic fluid embolus), eliminates the possibility of serious complications arising from retained fetal tissue, and eliminates

the risk of embolism of cerebral tissue into the woman's blood stream. *Id.* at 932, 935. Third, it reduces the risk of cervical injury in circumstances involving nonviable fetuses, such as fetuses with hydrocephaly, because reduction of the fetal calvarium allows a smaller diameter to pass through the woman's cervix. *Id.* at 929. Fourth, the intact D&E/D&X procedure can mitigate the special risks faced by women with prior uterine scars or for whom abortion by induction would be especially dangerous. *Id.* These factors led the Court to hold that any statute prohibiting the intact D&E/D&X procedure necessarily "creates a significant health risk" because "substantial medical authority" confirms the procedure's utility in safeguarding women's health. *Id.* at 938. Any such statute "must [therefore] contain a health exception." *Id.* The fact that the Nebraska statute – like the Act here – contained an exception to protect a woman's life had no bearing on the Court's holding that a freestanding health exception is constitutionally required. *See id.* at 921-22.

The dissent argues that the differences between the Act and the Nebraska statute are sufficient to exempt the Act from *Carhart*'s holding. *See post* at 19-21, 32-33. This argument fails because the two laws have key similarities. To begin with, the Nebraska law, like the Act, applied previability as well as postviability. *Carhart* makes clear that this "aggravates the constitutional problem presented" because a state's "interest in regulating abortion previability is considerably weaker than postviability." 530 U.S. at 930. (Again, Dr. Fitzhugh performs only previability abortions.) In addition, the Act criminalizes some of the same medical procedures (specifically, intact D&E/D&Xs) that Nebraska had criminalized, and these same procedures were the focus of the Court's attention in *Carhart*.

Admittedly, Nebraska's law was broader in scope than the one we consider here: the Nebraska law was read to prohibit both D&Es by disarticulation and intact D&E/D&Xs, *see id.* at 938, whereas the Act purports to except the former from its reach, *see* Va. Code Ann. § 18.2-71.1(B). In any event, the *Carhart* Court's analysis of the health exception requirement dealt exclusively with its application to the intact D&E/D&X procedure. *See* 530 U.S. at 930-38. *Carhart* thus applied the health exception requirement to only a subcategory of the total conduct proscribed by the Nebraska statute. Specifically, the Court addressed the question of whether a health exception was constitutionally required in the context of Nebraska's attempt to criminalize the intact D&E/D&X procedure. Justice O'Connor highlighted the Court's focus by explaining that if a statute "limited its application to the [intact D&E/]D&X procedure *and* included an exception for the . . . health of the mother, the question presented would be quite different." *Id.* at 950 (O'Connor, J., concurring) (emphasis added); *see also id.* at 948 (O'Connor, J., concurring) (explaining that "[t]his lack of a health exception necessarily renders the statute unconstitutional").

Indeed, it is not disputed in this case that the Act – like the Nebraska statute in *Carhart* – prohibits the intact D&E/D&X procedure. *See* Reply Br. of Appellants at 2 (explaining that the Act "does not allow the D&X procedure, or what is sometimes referred to as an 'intact D&E'"); *id.* at 3 (identifying "[t]he central issue in this case" as "whether [Virginia] may prevent use of the D&X or intact D&E" procedure). In the course of this medical procedure the fetus will often be "substantially expelled or extracted" from the woman's body, and the fetus will often show some "evidence of life" at the time the physician

commits a "deliberate act" that is "intended to" and "does" terminate the pregnancy. Va. Code Ann. § 18.2-71.1(B), (C), (D). The dissent gets nowhere by contending that "[i]t is the killing of the fetus, not the abortion procedure," that is outlawed by the Act. *Post* at 21; *see also post* at 44 n.5 (arguing that "[t]he Nebraska statute found unconstitutional in *Carhart* . . . differs materially from the Virginia statute" because "the former proscribed certain abortion *procedures* while the latter bans only the destruction of living fetuses"). Whatever else the Act might criminalize, it most certainly criminalizes the intact D&E/D&X *procedure*. As the *Carhart* Court explained (and as we note in part I), the fetal calvarium (or skull) is collapsed during the intact D&E/D&X procedure, 530 U.S. at 927-28, and during this procedure, which results in the demise of the fetus, the fetus may not be "completely extracted or expelled" from the woman's body, Va. Code Ann. § 18.2-71.1(B). Dr. Fitzhugh performs this very procedure, which would violate the Act, as the dissent acknowledges. *See post* at 30-31.

It is also undisputed that the Act makes no provision for those situations in which the intact D&E/D&X procedure "is necessary, in appropriate medical judgment, for the preservation of the . . . health of the mother." *Casey*, 505 U.S. at 879 (internal quotation marks omitted). This alone is enough to affirm the district court's judgment invalidating the Act because, again, any statute prohibiting the intact D&E/D&X procedure necessarily "creates a significant health risk" and therefore "must contain a health exception." *Carhart*, 530 U.S. at 938.

The Commonwealth argues that summary judgment was improper because the plaintiffs did not present substantial medical authority for the proposition that a

health exception is needed in this particular statute. The district court concluded otherwise, but that is beside the point. For *Carhart* established the health exception requirement as a *per se* constitutional rule. This rule is based on substantial medical authority (from a broad array of sources) recognized by the Supreme Court, and this body of medical authority does not have to be reproduced in every subsequent challenge to a "partial birth abortion" statute lacking a health exception.[1] *See, e.g.,*

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[1] The plaintiffs nevertheless presented medical authority in the summary judgment record that is strikingly similar to that considered by the Supreme Court in *Carhart*. For example, both Dr. Fitzhugh and Dr. Charles deProsse (the plaintiffs' 'expert) testified, based on their own lengthy experience in obstetrics and gynecology and on other medical sources, that the intact D&E/D&X abortion procedures prohibited by the Act are the safest and most medically appropriate for some women. Even Dr. Harlan Giles, a defense expert, testified that (1) the intact D&E/D&X as described in Dr. Fitzhugh's declaration represents a "safe and medically appropriate" procedure, and (2) physicians should be allowed the flexibility to perform the intact D&E/D&X procedure if they think to do otherwise "would endanger the woman's health." J.A. 483, 522.

In addition, an *amicus* brief was submitted to this court on behalf of a large group of physicians (over 3,400), including Physicians for Reproductive Choice and Health (PRCH), who have expertise in the field of reproductive health care and abortion procedures. These *amici* agree that the intact D&E/D&X procedure is an accepted medical procedure that is often the safest available. Br. of *Amici Curiae* PRCH et al. at 9, 12-23. They base their medical opinions on their own clinical experience and professional training, and they cite a variety of medical sources as further support. *See, e.g.,* Stephen T. Chasen et al., *Dilation and Evacuation at ≥ 20 Weeks: Comparison of Operative Techniques,* 190 Am. J. Ob. & Gyn. 1180, 1183 (2004) (finding that intact D&E/D&X and D&E by disarticulation are both safe procedures and recommending that physicians be allowed to decide which procedure is best for any given patient based on "intraoperative factors"); David A. Grimes, *The Continuing Need for Late Abortions,* 280 JAMA 747, 748 (1998) (explaining that intact D&E/D&X "may be especially useful in the presence of fetal anomalies, such as hydrocephalus," because calvarium

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Planned Parenthood v. Heed, 390 F.3d 53, 59 (1st Cir. 2004) (explaining that even a parental notification statute

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reduction allows "a smaller diameter to pass through the cervix, thus reducing risk of cervical injury," while also allowing the physician to retain greater surgical control); Maureen Paul, et al., A CLINICIAN'S GUIDE TO MEDICAL AND SURGICAL ABORTION 133-35 (1999) (noting that physicians often must compress or collapse the fetal calvarium to facilitate removal through the cervix).

In contrast, the Commonwealth proffered in the summary judgment proceedings the testimony of two expert (physician) witnesses who offered the opinion that no maternal health exception is necessary here. In addition, the Commonwealth proffered supporting materials from the Congressional Record that included the committee testimony of an OB/GYN professor. The district court excluded all of one expert's testimony and selected portions of the other's, concluding that it was unreliable and inadmissible under *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *See Hicks*, 301 F. Supp. 2d at 511-12. The materials from the Congressional Record were excluded as inadmissible hearsay. *See id.* at 512. Even if we assumed without deciding that the district court abused its discretion in excluding the Commonwealth's opinion evidence, the consideration of that evidence would not change our result. The Commonwealth's evidence would at most indicate some division of medical opinion on the question of whether "banning [the intact D&E/D&X] procedure could endanger women's health." *Carhart*, 530 U.S. at 938. As the Court emphasized in *Carhart*, "unanimity of medical opinion" is not required because a

> division of medical opinion . . . at most means uncertainty, a factor that signals the presence of risk, not its absence. . . . Where a significant body of medical opinion believes a procedure may bring with it greater safety for some patients and explains the medical reasons supporting that view, we cannot say that the presence of a different view by itself proves the contrary. Rather, the uncertainty means a significant likelihood that those who believe that [intact D&E/]D&X is a safer abortion method in certain circumstances may turn out to be right. If so, then the absence of a health exception will place women at an unnecessary risk of tragic health consequences. If they are wrong, the exception will simply turn out to have been unnecessary.

Id. at 937.

"must contain a health exception in order to survive constitutional challenge"), *cert. granted sub nom. Ayotte v. Planned Parenthood,* ___ S.Ct. ___, 2005 WL 483164 (May 23, 2005); *Planned Parenthood v. Wasden,* 376 F.3d 908, 922 (9th Cir. 2004) (characterizing health exception as "a *per se* constitutional requirement"), *cert. denied,* 125 S.Ct. 1694 (Mar. 28, 2005); *Women's Med. Prof'l Corp. v. Taft,* 353 F.3d 436, 444-45 (6th Cir. 2003) (explaining that *Casey* and *Carhart* require a health exception); *A Woman's Choice-E. Side Women's Clinic v. Newman,* 305 F.3d 684, 688 (7th Cir. 2002) (noting that *Carhart* Court was "of the view . . . that [the] constitutionality [of laws regulating abortion] must be assessed at the level of legislative fact, rather than adjudicative fact determined by more than 650 district judges. Only treating the matter as one of legislative fact produces the nationally uniform approach that [*Carhart*] demands."); *Planned Parenthood v. Owens,* 287 F.3d 910, 918 (10th Cir. 2002) (explaining that *Carhart* requires "state abortion regulations [to] provide an exception for the protection of the health of pregnant women"); *Reproductive Health Servs. of Planned Parenthood v. Nixon,* 325 F. Supp. 2d 991, 994-95 (W.D. Mo. 2004) (invalidating "partial birth abortion" statute "[b]ecause there are no genuine issues of material fact as to the presence of a health exception, [which requires the] Court, pursuant to *Stenberg v. Carhart,* [to] conclude that the [statute] is unconstitutional"); *Planned Parenthood Fed'n of Am. v. Ashcroft,* 320 F. Supp. 2d 957, 1013 (N.D. Cal. 2004) (noting that *Carhart* dispels characterization of the health exception inquiry "as one of pure fact, limited to the record in [the] particular case"); *WomanCare, P.C. v. Granholm,* 143 F. Supp. 2d 849, 855 (E.D. Mich. 2001) (invalidating "partial birth abortion" statute because "there are no genuine issues of material fact, with respect

to the lack of a health exception in the statute" and because the Supreme Court's decision in *Carhart* is "controlling"); *Summit Med. Assocs. v. Siegelman,* 130 F. Supp. 2d 1307, 1309, 1314 (M.D. Ala. 2001) (invalidating "partial birth abortion" statute "on the pleadings" and concluding that it was unconstitutional under *Carhart* "[f]or its lack of a health-exception alone"); *Daniel v. Underwood,* 102 F. Supp. 2d 680, 681, 684 (S.D. W.Va. 2000) (concluding that the state's "ban on 'partial-birth abortion' fails to provide an exception for the preservation of the health of the woman and therefore violates the United States Constitution" and explaining that *Carhart* "compels th[is] conclusion").

In sum, *Carhart* has already established, based on substantial medical authority, that a statute prohibiting the intact D&E/D&X abortion procedure necessarily "creates a significant health risk" and "must [therefore] contain a health exception." 530 U.S. at 938. Because the Act lacks a health exception, it is unconstitutional on its face.

III.

The Commonwealth also argues that the district court erred in failing to apply the proper standard for reviewing facial challenges alleging overbreadth. According to the Commonwealth, the court should have applied the standard set forth in *United States v. Salerno,* 481 U.S. 739 (1987). There, the Supreme Court said that "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *Id.* at 745. The plaintiffs

counter that the proper approach is that used by the Supreme Court in *Carhart,* where the Court – without applying *Salerno*'s "no set of circumstances" test – held that the Nebraska statute banning certain abortion procedures was unconstitutional on its face because it lacked a health exception. *See Carhart,* 530 U.S. at 930-38. We conclude, for the following reasons, that *Salerno* does not govern a facial challenge to a statute regulating abortion.

First, in *Carhart* the Supreme Court "without so much as a mention of *Salerno* . . . held invalid, in a pre-enforcement challenge, an abortion statute that might . . . have [had] at least some [constitutional] applications." *Newman,* 305 F.3d at 687. Earlier, the Court in *Casey* had similarly disregarded *Salerno.* As a result, seven circuits have concluded that *Salerno* does not govern facial challenges to abortion regulations. *See Heed,* 390 F.3d at 58-59; *Newman,* 305 F.3d at 687; *Planned Parenthood v. Farmer,* 220 F.3d 127, 142 (3d Cir. 2000); *Planned Parenthood v. Lawall,* 180 F.3d 1022, 1027 (9th Cir. 1999), *amended by* 193 F.3d 1042 (1999); *Women's Med. Prof'l Corp. v. Voinovich,* 130 F.3d 187, 193 (6th Cir. 1997); *Jane L. v. Bangerter,* 102 F.3d 1112, 1116 (10th Cir. 1996); *Planned Parenthood v. Miller,* 63 F.3d 1452, 1458 (8th Cir. 1995). Only the Fifth Circuit has suggested otherwise, but even that circuit's cases are inconsistent. *Compare Sojourner T v. Edwards,* 974 F.2d 27, 30 (5th Cir. 1992) (applying *Casey*'s undue burden test without reference to *Salerno), with Barnes v. Moore,* 970 F.2d 12, 14 & n.2 (5th Cir. 1992) (per curiam) (applying *Salerno* to a facial attack on an abortion regulation).

Second, contrary to the Commonwealth's suggestion, the question of *Salerno*'s applicability in the abortion

context has not been squarely confronted by this court. The Commonwealth claims that in *Manning v. Hunt*, 119 F.3d 254 (4th Cir. 1997), we "ruled that *Salerno* survived *Casey*." Br. of Appellants at 15. The parties in *Manning*, however, had not asked us "to decide that the District Court improperly applied the *Salerno* standard for review of facial challenges," and we therefore concluded that the issue was not properly before us. *Manning*, 119 F.3d at 268 n.4. Moreover, in *Planned Parenthood v. Camblos*, 155 F.3d 352, 359 n.1 (4th Cir. 1998) (en banc), our full court specifically declined to decide whether to apply *Salerno* to statutes regulating abortion. There, we characterized "*Manning*['s suggestion] that the *Salerno* standard remains the governing standard until the Supreme Court explicitly holds otherwise" as "dicta." *Id.* at 381 n.14. Later, in *Greenville Women's Clinic v. Bryant*, 222 F.3d 157 (4th Cir. 2000) (*Greenville I*), we again declined to resolve the question, holding that various aspects of a South Carolina regulation establishing standards for licensing abortion clinics were constitutional under either the *Casey* or *Salerno* standard for reviewing a facial challenge. *See id.* at 165 (concluding that the regulation at issue survived "[e]ven when we apply [the standard from *Casey*,] a less deferential standard than that articulated in *Salerno*"). In *Greenville Women's Clinic v. Commissioner*, 317 F.3d 357 (4th Cir. 2002) (*Greenville II*), we addressed further aspects of the facial challenge to the South Carolina abortion clinic licensing standards. We used the *Salerno* test there, but only in the context of reviewing a claim that the regulatory scheme allowed for the standardless delegation of medical licensing authority to third parties in violation of *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). *See Greenville II*, 317 F.3d at 361-63; *id.* at 372 & n.4 (King, J., dissenting).

Third, the recent case of *Sabri v. United States,* 124 S.Ct. 1941, 1948-49 (2004), puts the issue to rest by recognizing the appropriateness of facial challenges alleging overbreadth in the regulation of abortion. In *Sabri* the Supreme Court recognized that facial attacks are appropriate in only "limited settings" that include challenges to laws restricting abortion. *Id.* at 1949. In rejecting a criminal defendant's facial challenge to a federal bribery statute, the Court noted that facial challenges are to be discouraged because "they invite judgments on fact-poor records" and "call for relaxing familiar requirements of standing." *Id.* at 1948. Nevertheless, the Court stated that it had "recognized the validity of facial attacks alleging overbreadth . . . in relatively few settings," and these include challenges to abortion regulations. *Id.* (citing *Carhart*). Thus, *Sabri* makes clear that *Salerno*'s "no set of circumstances" standard does not apply in the context of a facial challenge, like the one here, to a statute regulating a woman's access to abortion.

IV.

As Justice O'Connor has said, "[t]he issue of abortion is one of the most contentious and controversial in contemporary American society. It presents extraordinarily difficult questions that . . . involve 'virtually irreconcilable points of view.'" *Carhart,* 530 U.S. at 947 (O'Connor, J., concurring) (quoting opinion of the Court, *id.* at 921). These questions are difficult and sensitive to be sure, but that does not give the dissent free license to accuse us of "tarring [liberty] with the color of political ideology," *post* at 43, "assert[ing] vacuously that we are doing what the Supreme Court commands," *post* at 44, deciding this case based on "personal convenience," *post* at 45, disregarding

"the mind's sense of right," *post* at 44, and "disconnecting our law from accepted moral norms," *post* at 43. No matter what the dissent says, the simple truth is that we affirm the district court's order striking down the Act for a single reason: the "lack of a health exception necessarily renders the [Act] unconstitutional." *Carhart,* 530 U.S. at 948 (O'Connor, J., concurring).

A woman's interest in protecting her health is at the core of her "constitutional liberty . . . to have some freedom to terminate her pregnancy." *Casey,* 505 U.S. at 869. This enduring principle – which the dissent either ignores or minimizes – was recognized in *Roe v. Wade,* the case in which the Supreme Court struck down a Texas abortion statute "that except[ed] from criminality only a *life-saving* procedure on behalf of the mother." 410 U.S. 113, 164 (1973). The *Roe* opinion also recognized that a state has an "interest in the potentiality of human life." *Id.* But even when this interest is at its highest point (subsequent to viability), a state may regulate or proscribe abortion only if it provides an exception for instances "where it is necessary, in appropriate medical judgment, for the preservation of the . . . health of the mother." *Id.* at 165. This constitutional principle was expressly reaffirmed by the Court in *Casey,* 505 U.S. at 846, 879, and reinforced in *Carhart,* 530 U.S. at 921.

We acknowledge, as did the Supreme Court in *Casey,* that "[m]en and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy." 505 U.S. at 850. But even if "abortion [is] offensive to our most basic principles of morality . . . that cannot control our decision," for our obligation is to apply the Supreme Court's definition of personal liberty, "not to

mandate our own moral code." *Id.* Thus, we are bound today to apply *Carhart*'s constitutional rule that any ban on "partial birth abortion" must include an exception to protect a woman's health. We have been fore-warned by the Court that "[s]ome cost will be paid by anyone who approves or implements a constitutional decision where it is unpopular, or who refuses to work to undermine the decision or to force its reversal. The price may be criticism or ostracism, or it may be violence." *Id.* at 867. The Court further warned that "[a]n extra price will be paid by those who themselves disapprove of the decision's results when viewed outside of constitutional terms, but who nevertheless struggle to accept it, because they respect the rule of law." *Id.* at 867-68. These words have special resonance in today's climate, and they serve to remind us of the critical importance of our obligation to follow faithfully the decisions of the Supreme Court.

V.

Because the Virginia Act does not contain an exception for circumstances when the banned abortion procedures are necessary to preserve a woman's health, we affirm the summary judgment order declaring the Act unconstitutional on its face. We likewise affirm the permanent injunction against enforcement of the Act.[2]

AFFIRMED

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[2] Because the Act is invalid for its lack of a health exception, we decline to address the district court's alternative grounds for striking it down. For this same reason, it is unnecessary for us to consider the Commonwealth's other arguments.

NIEMEYER, Circuit Judge, dissenting:

The Commonwealth of Virginia enacted a law in 2003, making it a criminal offense to kill a "human infant who has been born alive, but who has not been completely extracted or expelled from its mother." Va. Code Ann. § 18.2-71.1(B). The statute applies to protect only a live fetus that has been delivered halfway into the world – i.e., either "the infant's entire head is outside the body of the mother" or, for a breech delivery, "any part of the infant's trunk past the navel is outside the body of the mother." *Id.* § 18.2-71.1(D). In enacting this narrow provision, Virginia focused on preserving the life of infants and distinguishing its law from the Nebraska statute struck down as unconstitutional in *Stenberg v. Carhart,* 530 U.S. 914 (2000), that prohibited an array of abortion *methods.*

Without recognizing the differences between the Nebraska statute and the Virginia statute and without taking into account the facts before this court, the panel majority reads *Carhart* to create a *per se* constitutional rule that requires any ban on partial-birth abortion to contain language protecting the health of the mother, regardless of the scope of the law, the nature of the relevant facts, and the actual need for a health exception. By so extending *Carhart* and applying a *per se* rule, the majority mechanically strikes down the Virginia statute as unconstitutional, without further analysis.

In addition, to strike down Virginia's statute on a facial challenge, the majority found it necessary to disregard our established standard for reviewing facial challenges of abortion laws in favor of a more liberal standard of review.

The majority's opinion is a bold, new law that, in essence, constitutionalizes infanticide of a most gruesome nature. The plaintiff Dr. William Fitzhugh, an abortionist, sought, through this lawsuit, to protect his ability to perform abortions by crushing infants' skulls or dismembering their limbs when they are inches away from being fully delivered alive without injury to the infant or to the mother. In his words, "My job on any given patient is to terminate that pregnancy, which means that I don't want a live birth." By expanding abortion rights to this extent, the majority unnecessarily distances our jurisprudence from that of the Supreme Court and from general norms of morality. I profoundly dissent from today's decision.

I

By casting *Carhart*'s holding in the most general terms – that a State may not prohibit partial birth abortions without providing an exception for the health of the mother – the majority rejects Virginia's contention that the plaintiffs in this case did not present "substantial medical authority for the proposition that a health exception is needed in this particular statute." The majority reasons that "*Carhart* established the health exception requirement as a *per se* constitutional rule," *ante* at 11, and accordingly holds that "[b]ecause the Act lacks a health exception, it is unconstitutional on its face," *ante* at 14. This gross application of *Carhart* fails to take into account the nature of the Nebraska statute under consideration in *Carhart*, the factual findings on which the Supreme Court based its opinion, and the reach of the Supreme Court's actual holding.

Deferring momentarily the discussion of whether *Carhart* created a *per se* constitutional rule that statutes like the Nebraska statute must have a health exception, the Virginia statute is sufficiently different from the Nebraska statute that any would-be *per se* rule does not apply to it. The statute in *Carhart* provided that "[n]o partial birth abortion shall be performed in this state," except to save the life of the mother. *Carhart,* 530 U.S. at 921 (quoting Neb. Rev. Stat. § 28-328(1)) (internal quotation marks omitted). The Supreme Court read the Nebraska statute to prohibit an array of abortion *methods* that included both "dilation and evacuation" ("D&E") and "dilation and extraction" ("D&X"). *See id.* at 938. D&E generally refers to destruction of the fetus in the uterus and removal of the destroyed and even dismembered fetus, while D&X generally refers to delivery of the fetus into the vagina in whole or in part and then destroying it, generally by sucking out the contents of the fetus' skull or by crushing the skull. Important to the case before us, the Supreme Court summarized the scope of the Nebraska law by stating that it "of course, does not directly further an interest 'in the potentiality of human life' by saving the fetus in question from destruction, as it regulates only a *method* of performing abortion." *Id.* at 930 (Supreme Court's emphasis).

Unlike the Nebraska statute, the Virginia statute protects the fetus itself, by prohibiting its destruction when it has been delivered alive into the world or at least halfway into the world. Also in contrast to the Nebraska statute, which only prohibited abortion procedures, the Virginia statute excepts from its coverage various abortion

methods prohibited by the Nebraska statute[1] and limits itself to protecting the fetus by prohibiting the killing of a "human infant who has been born alive, but who has not been completely extracted or expelled from its mother . . . regardless of whether death occurs before or after extraction or expulsion from its mother has been completed." Va. Code Ann. § 18.2-71.1(B). Yet, it is only by assuming that the Virginia statute is the same as the Nebraska statute that the majority is able to strike down the Virginia statute using its *per se* analysis.

The majority repeatedly characterizes the Virginia statute as banning abortion *procedures,* including the "intact D&E/D&X procedure," *ante* at 9-10, *see also ante* at 5, 6, 10-11, and, relying on that characterization, analogizes the Virginia statute to the unconstitutional Nebraska statute, which the Supreme Court interpreted to prohibit abortion *procedures.* By employing the analogy, the majority is thus able to argue that in prohibiting what might sometimes be the safest partial birth abortion *procedure* – the "intact D&E/D&X procedure" – Virginia infringes a woman's right to obtain a safe abortion. *Ante* at 9-11.

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[1] The relevant portion of the Virginia statute excludes from the statutory coverage

> (i) the suction curettage abortion procedure, (ii) the suction aspiration abortion procedure, (iii) the dilation and evacuation abortion procedure involving dismemberment of the fetus prior to removal from the body of the mother, [and] (iv) completing delivery of a living human infant and severing the umbilical cord of any infant who has been completely delivered.

Va. Code Ann. § 18.2-71.1(B).

The majority overlooks, however, that if the fetus is not deliberately destroyed during an "intact D&E/D&X procedure," and it need not be to complete the procedure, Virginia's statute, unlike Nebraska's statute, does not prohibit the procedure. It is the killing of the fetus, not the abortion procedure, that is the concern of Virginia's statute. And while prohibiting a safe procedure increases a woman's health risks, no one has contended that banning the destruction of a fetus after an intact delivery implicates the mother's health at all. Rather than address this distinction directly, the majority asserts that the Virginia statute bans the intact D&E/D&X procedure because "the fetal calvarium (or skull) is collapsed during [that] procedure." *Ante* at 10. Such a simplistic view of the statute and abortion procedures fails to account for the Commonwealth's evidence that crushing the fetal skull is necessary neither to terminate a pregnancy after an intact delivery nor to obtain the purported safety advantages of the intact D&E/D&X procedure.

In addition to relying on the incorrect assumption that the Virginia statute is identical to the statute at issue in *Carhart*, the majority's analysis also depends on the unsupportable premise that *Carhart* created a *per se* constitutional rule. Correctly noting that *Carhart* holds that a "state cannot force women to use methods of abortion that present greater risks to their health than other available methods," *ante* at 8, the majority goes on to affirm the district court's opinion without assessing whether the Virginia statute would in fact force women to use riskier methods of abortion. In response to Virginia's defense that the plaintiffs in this case did not present "substantial medical authority for the proposition that a health exception is needed in this particular statute," *ante* at 11, the majority states that such a consideration is irrelevant

because "*Carhart* establishes the health exception requirement as a *per se* constitutional rule," *ante* at 11.

Nothing in *Carhart*, however, indicates that the Court was creating a *per se* constitutional rule or that every abortion statute, regardless of whether it targets methods of abortion or the life of the fetus or some other state interest, must contain a clause that provides for the protection of the mother's health. To read *Carhart* so superficially loses focus of the protection being implemented there. As the *Carhart* Court said, "We shall not revisit those legal principles [providing basic protection to the mother's right to choose]. Rather, we apply them *to the circumstances of this case.*" 530 U.S. at 921 (emphasis added). And, of course, the Court thus rendered its holding on the underlying principle being implemented: that a State cannot "interfere with a woman's choice to undergo an abortion procedure *if continuing her pregnancy would constitute a threat to her health.*" *Planned Parenthood v. Casey*, 505 U.S. 833, 880 (1992) (emphasis added) (citing *Roe v. Wade*, 410 U.S. 113, 164 (1973)).

Moreover, in *Carhart* there was a full trial in which the district court made findings of fact and then considered how the Nebraska statute and the Constitution applied to those facts. In explicitly declining to conduct a facial review of the statute, the district court found itself unprepared to conclude that the law was unconstitutional "regardless of how it might be applied to a particular plaintiff," because such an inquiry would entail too many "unknown" factual circumstances. *Carhart v. Stenberg*, 11 F. Supp. 2d 1099, 1119-20 (D. Neb. 1998). The Supreme Court drew upon the district court's findings, as well as "related medical texts," and applied established preexisting abortion jurisprudence to that record. *See Carhart*, 530

U.S. at 923-29. Indeed in responding to Nebraska's argument, like Virginia's here, that "safe alternatives remain available" and that a "ban . . . would create no risk to the health of women," the Supreme Court responded, not as the majority suggests here by applying a *per se* rule, but by noting,

> The problem for Nebraska is that the parties strongly contested this factual question in the trial court below; and the findings and evidence support Dr. Carhart.

Id. at 931-32. That the Supreme Court did not create a *per se* rule is further fortified by its statement of its holding, which inherently precludes such a conclusion:

> The upshot is a District Court finding that D&X significantly obviates health risks in certain circumstances, *a highly plausible record-based explanation* of why that might be so, a division of opinion among some medical experts over whether D&X is generally safer, and an absence of controlled medical studies that would help answer these medical questions. *Given these medically related evidentiary circumstances,* we believe the law requires a health exception.

Id. at 936-37 (emphasis added).

Quite apart from considering the actual nature of the Supreme Court's holding in *Carhart,* the majority elects to rely on five circuit court cases that it contends support its conclusion that *Carhart* created a *per se* rule. *See ante* at 11-14. Even without conducting a full analysis of those nonbinding decisions for their faithfulness to *Carhart,* it becomes readily apparent that the support each provides is nil or little.

Only one of the five circuit court cases cited by the majority stands for the proposition that *Carhart* established a *per se* constitutional rule that obviated the need to examine medical authority in abortion cases. *See Planned Parenthood v. Heed,* 390 F.3d 53, 59 (1st Cir. 2004) (invalidating a parental notification law due to its lack of a health exception), *cert. granted sub nom. Ayotte v. Planned Parenthood,* ___ S.Ct. ___, 2005 WL 483164 (May 23, 2005). Yet, the holding of that case – that *all* statutes "regulating abortion must contain a health exception in order to survive constitutional challenge," *id.* – can hardly be considered a faithful interpretation of *Carhart,* which even under the majority's expansive reading, created a *per se* rule only for *partial birth abortion* laws.

The majority avoids providing any context for the remainder of its citations presumably because closer inspection reveals that – far from treating *Carhart* as establishing a *per se* constitutional rule – the only circuit court cases to have directly addressed the question have found a health exception to be necessary only after considering evidence introduced by the parties. In *A Woman's Choice – Eastside Women's Clinic v. Newman,* 305 F.3d 684, 688 (7th Cir. 2002), the Seventh Circuit did indeed observe that the Supreme Court had previously treated the necessity of a health exception as a question of legislative fact, but then went on to explain why it was *not* following that approach:

> Because the Supreme Court has not made this point explicit, however, and because the undue-burden approach does not prescribe a choice between the legislative-fact and the adjudicative-fact approaches, we think it appropriate to review the evidence in this record and the

> inferences that properly may be drawn at the pre-enforcement stage.

Id. at 688-89.

The majority's truncation of the sentence it lifts from the Tenth Circuit's opinion in *Planned Parenthood v. Owens,* 287 F.3d 910 (10th Cir. 2002), similarly creates the misimpression that that circuit treats *Carhart* as a *per se* constitutional rule. Read in full, the sentence quoted by the majority states: "Thus, the current state of the law is that state abortion regulations must provide an exception for the protection of the health of pregnant women *where those regulations might otherwise infringe on their ability to protect their health through an abortion.*" *Id.* at 918 (emphasis added to the portion omitted from the majority's opinion). The second half of the sentence clarifies the court's understanding that *Carhart* does not require a health exception in all abortion regulations, but only in those that might endanger a woman's health. And, that clarification explains why the Tenth Circuit deemed it necessary to examine the evidence contained in the record before finding that "there [was] no genuine issue as to the material fact that the [statute] infringe[d] on the ability of pregnant women to protect their health." *Id.* at 920.

The remaining two circuit court cases cited by the majority – *Planned Parenthood v. Wasden,* 376 F.3d 908 (9th Cir. 2004), and *Women's Medical Professional Corp. v. Taft,* 353 F.3d 436 (6th Cir. 2003) – similarly do not stand for the proposition for which the majority cites them. *Wasden* addressed the question of whether a regulation "must contain adequate provision for a woman to terminate her pregnancy if it poses a threat to her life or health," 376 F.3d at 922, not the distinct question, raised

by partial-birth abortion bans, of whether a statute that regulates some aspect of abortion procedure but does not prevent a woman from terminating her pregnancy must contain a health exception. And, while *Taft* did address a partial-birth abortion ban, the particular statute at issue there already contained a health exception, and neither party argued that a health exception was unnecessary. 353 F.3d at 444-45. The only question, which the court answered in the affirmative, was whether the statute's health exception was constitutionally adequate. *Id.* at 450.

Perhaps recognizing the scant support for its *per se* rule among our sister circuits, the majority resorts to citing a handful of apparently randomly selected district court opinions. *See ante* at 11-14. A more thorough survey of the case law reveals a roughly even split between district courts that interpret *Carhart* to have established a *per se* rule and those that interpret *Carhart* to require a health exception only if the record demonstrates that the regulation at issue might endanger a woman's health. *Compare Reproductive Health Servs. of Planned Parenthood v. Nixon*, 325 F. Supp. 2d 991, 994 (W.D. Mo. 2004) (striking down a state partial birth abortion ban for lack of a health exception without examining evidence in the record); *WomanCare, P.C. v. Granholm*, 143 F. Supp. 2d 849, 854-55 (E.D. Mich. 2001) (same); *Summit Med. Assocs. v. Siegelman*, 130 F. Supp. 2d 1307, 1314 (M.D. Ala. 2001) (relying on *Carhart*'s factual findings to strike down a state partial birth abortion ban), *with Carhart v. Ashcroft*, 331 F. Supp. 2d 805 (D. Neb. 2004) (striking down the Federal Partial-Birth Abortion Ban Act of 2003 in a 269-page opinion, in which the court weighed the evidence presented during the course of a two-week trial); *Nat'l Abortion Fed'n v. Ashcroft*, 330 F. Supp. 2d 436, 442,

482 (S.D.N.Y. 2004) (finding the Federal Partial-Birth Abortion Ban unconstitutional for lack of a health exception because the evidence adduced during a sixteen-day bench trial demonstrated that "a significant body of medical opinion" supported the proposition that the ban would endanger a woman's health); *Planned Parenthood Fed'n of Am. v. Ashcroft,* 320 F. Supp. 2d 957, 1012-13, 1033 (N.D. Cal. 2004) (holding that "*Stenberg*'s health exception requirement does not appear to arise to the level of a constitutional 'rule' like *Miranda* requirements" and finding it necessary to examine the record before determining whether "significant medical authority supports the proposition that in some cases, [intact D&E] is the safest procedure" (internal quotation marks and citation omitted)); *Daniel v. Underwood,* 102 F. Supp. 2d 680, 684-85 (S.D. W. Va. 2000) (examining evidence submitted by the parties before concluding that West Virginia's partial birth abortion ban "create[d] a significant health risk" and therefore had to provide a health exception). In short, the majority's ten-case-long string cite cannot disguise the fact that the weight of authority does not support its interpretation of *Carhart.*

II

In addition to its mechanical application of a *per se* rule, which the majority unjustifiably creates, the majority also ignores this circuit's existing standard for facial challenges of abortion statutes. *See Greenville Women's Clinic v. Commissioner* ("*Greenville Women's Clinic II*"), 317 F.3d 357, 362 (4th Cir. 2002); *Greenville Women's Clinic v. Bryant* ("*Greenville Women's Clinic I*"), 222 F.3d 157, 165 (4th Cir. 2000); *Manning v. Hunt,* 119 F.3d 254, 268-69 (4th Cir. 1997). It finds that our "standard does not

apply in the context of a facial challenge . . . to a statute regulating a woman's access to abortion." *Ante* at 16. In attempting to limit or distinguish our rule and apply one that is more liberal for its purposes, the majority unapologetically violates the well-established rule that one panel of this court may not overrule another. *See United States v. Prince-Oyibo,* 320 F.3d 494, 498 (4th Cir. 2003); *Scotts Co. v. United Indus. Corp.,* 315 F.3d 264, 271 n.2 (4th Cir. 2002).

The standard articulated by the Supreme Court in *United States v. Salerno,* 481 U.S. 739 (1987), for facial challenges of statutes provides: "A facial challenge to a legislative act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *Id.* at 745; *see also Rust v. Sullivan,* 500 U.S. 173, 183 (1991) (explaining that a facial challenge will fail if an act "can be construed in such a manner that [it] can be applied to a set of individuals without infringing upon constitutionally protected rights"). This standard stems from the fact that we are courts exercising *judicial* power over actual cases, and not super-legislatures reviewing legislative acts in the abstract. And this circuit has applied the *Salerno* standard to facial reviews of abortion statutes in three cases that have not been overturned by either the Supreme Court or this court sitting *en banc. See Greenville Women's Clinic II,* 317 F.3d at 362; *Greenville Women's Clinic I,* 222 F.3d at *165; Manning,* 119 F.3d at 268-69. To avoid applying this standard and thereby being required to uphold the constitutionality of Virginia's infanticide statute, the majority unjustifiably turns aside the binding precedents of this court.

First, it explains that in *Manning,* we did not decide the issue, because "the issue was not properly before us." *Ante* at 15. In *Manning,* we reviewed the district court's denial of the plaintiff's claim that facially challenged North Carolina's Act to Require Parental or Judicial Consent for an Unemancipated Minor's Abortion. In conducting our review, we said, "Because this is a facial challenge, appellants carry a heavy burden," and we then set forth and cited the *Salerno* standard. *Manning,* 119 F.3d at 268. We noted that the district court had applied the *Salerno* standard and that the challengers to the statute did not take exception to that standard on appeal. Accordingly, we applied the *Salerno* standard in our holding:

> Thus, in order to succeed, Appellants are required to show that under no set of circumstances can the Act be applied in a manner which is not an undue burden on an unemancipated pregnant minor's right to obtain an abortion.

Id. at 268-69. *Salerno* therefore was the standard that we explicitly applied in *Manning,* and the finding of that standard was *necessary* to our ruling rejecting the plaintiff's facial challenge of the statute. How the majority can conclude that this was not a decision of our court is baffling. The majority apparently has found comfort in quoting a portion of one sentence in footnote 4 of that opinion that indicated that the applicability of *Salerno* to facial challenges of abortion regulations was "not [then] properly before the court." But it could not have relied on even that explanatory statement without reading further into the footnote. After noting that the standard of review was not challenged by the statute's challengers and therefore was not placed before us, we nonetheless recognized

that we had to apply a standard of review. And we said further on in footnote 4:

> At the moment, the most that can be said is that three Justices have indicated a desire to [overrule application of *Salerno*]. Until the Supreme Court specifically does so, though, *this Court is bound to apply the Salerno standard* as it has been repeatedly applied in the context of other abortion regulations reviewed by the Supreme Court.

Id. at 268 n.4 (emphasis added).

Were the holding in *Manning* not clear, however, – and the majority apparently concludes that it was not because we decided the case on a standard that was not challenged by the parties – our decision in *Greenville Women's Clinic I,* put the question to rest. There, discussing the holding of *Manning* at some length, we stated:

> While we believe that the observation in *Manning was part of the court's holding* because application of *Salerno* was necessary to the ruling in that case and not dictum, we add the observation that the logic of the *Salerno* test is necessary to show deference to legislatures, particularly in light of the limitation imposed by Article III of the Constitution that the judiciary act only in cases and controversies. *See* U.S. Const. art. III, § 2. As we explain below, when the abortion clinics are confronted with *Salerno*'s requirement that no set of circumstances exists under which Regulation 61-12 would be valid, they fail, if for no other reason, because the impact on the Greenville Women's Clinic is so modest.

222 F.3d at 165 (emphasis added). We not only held that *Manning did* decide the proper standard to apply, but we again applied that standard in *Greenville Women's Clinic I*. The majority insists that we rendered an alternative ruling under the more liberal standard. But a closer reading of *Greenville Women's Clinic I* reveals that we rendered our principal (and therefore binding) holding under the *Salerno* standard. Our hypothetical application of the more liberal standard served only to underscore the inherent weakness of the plaintiffs' claims. *See id.*

Finally, seeking to distinguish *Greenville Women's Clinic II*, the majority states that "[w]e used the *Salerno* test there, but only in the context of reviewing a claim that the regulatory scheme allowed for the standardless delegation of medical licensing authority to third parties in violation of *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)." *Ante* at 15. The review in that case, though, was a continuation of the review begun in *Greenville Women's Clinic I*, and we so stated:

> This appeal continues our review of the facial constitutional challenges made by abortion clinics in South Carolina to Regulation 61-12 of the South Carolina Department of Health and Environmental Control, establishing standards for licensing abortion clinics.

317 F.3d at 359. We then held *directly and explicitly*, clarifying that which was our principal holding in *Greenville Women's Clinic I*, that the *Salerno* standard applies to the facial challenge of an abortion regulation:

> We begin by emphasizing, as we did in [*Greenville Women's Clinic I*], that the challenge to Regulation 61-12 [South Carolina's abortion regulation] is a facial one and therefore "the most

> difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). To show the necessary respect to legislative departments, particularly in light of Article III's limitation of judicial power to cases and controversies, we require evidence – as opposed to speculation – sufficient to rebut the regulation's presumptive constitutionality. Yet, in this record, we find only speculation.

Id. at 362.

Had the majority conducted its review under the *only* standard legally established in our circuit for facial review of abortion statutes, it would have found itself compelled, in view of the record in this case, to conclude that Virginia's infanticide statute is constitutional. To achieve its contrary ruling, the majority trampled not only the precedents establishing the applicability of the *Salerno* standard but also the precedents establishing that one panel of our court may not overrule another. *See Prince-Oyibo*, 320 F.3d at 498; *Scotts Co.*, 315 F.3d at 271 n.2.

III

The underlying principles guaranteeing a woman's conditional right to choose an abortion were not altered by the holding in *Carhart*, as the *Carhart* Court expressly noted. *See* 530 U.S. at 921. And it is useful to keep at hand the nature of the right applied in *Carhart* when considering the Virginia statute in this case.

Before viability of a fetus, a "woman has a right to choose to terminate her pregnancy," and if a statute

unduly burdens that decision, it is unconstitutional. *Id.* (citation and internal quotation marks omitted). After viability, the State, in protecting its legitimate interest in potential life, may "regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Id.* (citation and internal quotation marks omitted).

In *Carhart,* the Nebraska statute was found to prohibit a range of abortion procedures employed by doctors at various stages of fetal growth and for various conditions confronted by the doctor at the time the abortion is conducted. Taking into account the factual record and related medical texts, the Supreme Court concluded, "where substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women's health" and there is a "highly plausible record-based explanation for why that might be so," the Constitution "requires the statute to include a health exception where the procedure is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Carhart,* 530 U.S. at 936, 938 (citation and internal quotation marks omitted).

In the case before us, Dr. Fitzhugh and the Richmond Medical Center for Women, of which he is the founder, owner, and medical director[2] (referred to collectively or

[2] Dr. Fitzhugh is board certified in obstetrics and gynecology, and as part of his practice, he performs over 200 second-trimester abortions each year at hospitals in Richmond and Henrico County, Virginia. The Richmond Medical Center for Women was founded "to provide abortion services," and it operates clinics in Richmond and Roanoke, at which physicians perform first-trimester abortions.

individually as "Dr. Fitzhugh"), have attempted to create a record similar to that created in *Carhart*. Recognizing that the Virginia statute addresses only abortion procedures in which a live fetus has substantially or completely emerged from its mother and excepts from its coverage a broad range of procedures proscribed by the Nebraska statute in *Carhart*, Dr. Fitzhugh still complains about two procedures that he contends are improperly prohibited by the Virginia statute. *First*, he correctly asserts that the statute prohibits killing the fetus after it is fully delivered through the cervix intact, sometimes head first. As Dr. Fitzhugh testified, "In such circumstances, I might need to collapse the calvarium (skull) of the fetus in order to complete the procedure." Arguing that an intact delivery is often the safest abortion method, Dr. Fitzhugh contends that the Constitution prohibits Virginia from banning the destruction of the fetus in these circumstances without a health exception.

Second, Dr. Fitzhugh claims that the statute also impermissibly limits his ability to complete an abortion involving a feet-first delivery where the head of the fetus becomes lodged in the woman's cervix. In such a scenario, Dr. Fitzhugh states that he crushes the fetus' skull, or collapses it by sucking out its contents, and then completes the delivery of the fetus. He correctly states that by performing this procedure he would violate the statute by killing the fetus after its feet and body had come through the woman's cervix.

Under Dr. Fitzhugh's first scenario for objecting to the Virginia statute, the mother's health is not brought into play at all. The live intact fetus is delivered into the vagina or beyond, and whether it is destroyed after reaching that stage does not affect the mother's health. As

Dr. Charles deProsse, Dr. Fitzhugh's expert witness, testified:

> Q. And when [the fetus] comes out largely intact, does that mean that you're able to remove the fetus completely from the woman without any parts disarticulating?
>
> A. Occasionally that can be.
>
> Q. And in the instance where that happens, I take it you wouldn't engage in any other act to kill the fetus other than removing it and to place it where you place the tissues you are removing; is that correct?
>
> A. Correct.

Dr. Fitzhugh could not think of any threat to the mother's health under this scenario, and he candidly recognized that his destruction of the fetus at that stage would not be to preserve the mother's health, but rather to complete the abortion procedure. As he testified:

> Q. And the health benefit [to the mother] is the termination of the pregnancy, not necessarily the death of the fetus; is that correct? In other words – let me phrase it this way – termination of the pregnancy is going to eliminate the health concern with respect to the [mother's] conditions that you have just described, whether or not what is removed is alive or dead; is that correct?
>
> A. My ultimate job on any given patient is to terminate that pregnancy, which means that I don't want a live birth.

The district court assumed that the Virginia statute prohibits intact deliveries of live fetuses – as did the

Nebraska statute reviewed in the *Carhart* case – and therefore concluded that under *Carhart* the statute had to have a health exception.[3] The district court reasoned that by prohibiting intact deliveries, the doctor had to dismember or destroy the fetus inside the mother to comply with the statute, which presented a greater health risk to the mother than would an intact delivery. The doctor's sharp instruments, and sharp fetal fragments, as well as "uterine perforation," were far riskier to the mother than the intact delivery. But the district court's assumption that the statute prohibits intact deliveries of live fetuses finds no basis in the Virginia statute. The district court applied *Carhart* without recognizing the distinction between the Nebraska statute and the Virginia statute.

In contrast to the statute at issue in *Carhart,* which was fairly construed as banning intact deliveries, the statute here cannot be so construed. Specifically, the *Carhart* statute in prohibiting any "partial birth *abortion,*" banned the "deliberate[] and intentional[] *deliver[y]* into the vagina [of] a living unborn child . . . for the purpose of *performing a procedure*" that knowingly would result in the death of the child. The procedure was banned regardless of where within the mother the fetus was destroyed or how it was destroyed. *Carhart*, 530 U.S. at 921 (quoting Neb. Rev. Stat. § 28-328(9)) (emphasis added). The statute in this case bans any "deliberate act . . . intended to kill a human infant who has been born alive, but who has not been completely extracted or expelled from its mother, and that . . . does kill such infant." Va. Code Ann. § 18.2-71.1(B). In other words, the *Carhart* statute banned the

[3] The majority now adopts the same argument. *See ante* at 9-10.

delivery part of a partial birth abortion procedure, whereas the Virginia statute does not ban the delivery part if the intact fetus is not destroyed. It bans only the killing part of such a procedure. The distinction is important because it makes the question of whether intact deliveries have safety advantages over deliveries involving dismemberment irrelevant in this case, for the statute has nothing to say about, and indeed permits, intact deliveries when the fetus is not deliberately destroyed. *But see ante* at 8-9 (focusing on the health advantages of intact deliveries). The only relevant question in an intact delivery is whether a woman's health would be endangered by prohibiting the physician from intentionally killing a fetus that has been so delivered and is still alive.

That brings us to Dr. Fitzhugh's second scenario for objecting to the statute: that during an abortion procedure involving the breach delivery of the fetus, the fetal skull sometimes becomes lodged in the mother's cervix, forcing him to kill the fetus by crushing its skull so as to preserve the health of the mother.

It must be noted first that when the head of the fetus becomes lodged in the mother's cervix, the condition poses a threat to the mother's *life*, and to abate that risk, Dr. Fitzhugh prefers to crush the skull of the fetus and then remove it. As he testified:

> Q. So would you agree with me that if you had the – if you did not complete the delivery in the scenario you just described [where the head was lodged] – you know, you said collapsing the skull or whatever other means

> – *that the woman's life would be at risk?* Do you agree with that?
>
> A. Yes sir.

(Emphasis added). The Virginia statute, however, makes an exception from its proscriptions "to prevent the death of the mother." Va. Code Ann. § 18.2-71.1(E).

Thus, under neither scenario advanced by Dr. Fitzhugh to challenge the constitutionality of Virginia's statute has he demonstrated the need for a *health* exception.

Even if Dr. Fitzhugh's position could be understood to demonstrate a risk to the mother's health, and not to her life, his opinion on such a risk and the opinion of doctors presented by Virginia differ markedly. The record demonstrates that a genuine issue of material fact exists as to whether substantial medical authority in fact supports the proposition that barring physicians from collapsing or crushing the fetal skull would endanger the health of a woman. In these circumstances, summary judgment cannot be granted.

Dr. Fitzhugh did present some evidence that prohibiting a physician from crushing or collapsing a fetal head that becomes lodged in the mother's cervix would endanger the mother's life, or perhaps health. The evidence advanced by Dr. Fitzhugh establishes that in approximately .5% of the D&E abortions Dr. Fitzhugh and his clinics perform, the skull becomes lodged in the woman's cervix. This places the woman's life at risk according to Dr. Fitzhugh. And according to Dr. Charles deProsse, Dr. Fitzhugh's expert witness, the physician "must compress" the fetal skull.

The evidence presented by Virginia, however, painted a substantially different picture.[4] According to the Commonwealth's testimony, the prohibitions in the statute would not endanger a woman's health because there are equally safe alternatives in the circumstances covered by the statute. First, Dr. Harlan Giles testified that no medical authority supports the proposition that it would be necessary to crush a lodged fetal skull. Similarly, Dr. John Seeds testified that there "is no clinical scenario [he could] imagine where a physician would have to resort to a procedure that violated [the statute]."

Moreover, Virginia introduced evidence showing that equally safe alternatives exist for completing an abortion during which the fetal skull has become lodged in the mother's cervix. Dr. Giles testified that the cervix will often dilate and naturally expel the skull if given sufficient time. He testified that the physician can also lightly compress (as opposed to crush) the skull using forceps without intending to kill the fetus to remove it from the cervix. Finally, he noted that certain muscle relaxants can be used to increase cervical dilation and thereby dislodge the skull. Dr. Giles indeed provided testimony that crushing the fetal skull, as preferred by Dr. Fitzhugh, actually *increases* the risk to a woman's health due to fragmentation of bony parts and maternal tears. Similarly, Virginia provided the testimony of Dr. Mark Neerhof given before the House of Representatives Judiciary Committee, in which he stated that injecting scissors into the fetal skull

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[4] Even though the district court excluded a significant amount of Virginia's evidence, I conclude that it did so improperly, *see* Part V, *infra*, and accordingly consider some of that evidence to describe Virginia's presentation of a different factual picture.

to crush it subjects the woman to the risk of lacerations to her cervix and uterus and could result in severe bleeding, shock, and maternal death.

Dr. Fitzhugh's only response to this contradicting evidence is to argue that unless *Virginia proves* that no medical authority supports Dr. Fitzhugh's assertion, Dr. Fitzhugh must win and the statute must be stricken. Dr. Fitzhugh forgets, however, that he bears the burden of proving that substantial medical authority supports his proposition that the statute requires a maternal health exception, and when questions of fact about this proposition exist, the district court is precluded from entering summary judgment. The issue must be reserved for trial, as was done in *Carhart*.

IV

The district court advanced three additional grounds for striking down Virginia's statute, which the majority did not address because of its ruling that the Virginia statute is *per se* unconstitutional for failing to include a maternal health exception. Because of my would-be ruling that Virginia's narrow statute need not contain such an exception, I will address these additional three grounds advanced by the district court, in order.

A

First, in holding the Virginia statute unconstitutional, the district court relied on *Carhart*'s holding that a statute that "'imposes an undue burden on a woman's ability' to choose a D&E abortion . . . unduly burden[s] the right to choose abortion itself." *See Carhart*, 530 U.S. at 930 (quoting *Casey*, 505 U.S. at 874). The district court

identified two scenarios in which a physician, who intends to perform a D&E, would violate the statute. The first scenario occurs when a woman's cervix is aligned so closely with her vagina that during the abortion procedure, the cervix gets pulled outside her vagina. Dr. Fitzhugh estimated that he sees such an anatomical configuration in approximately one-third of his second-trimester abortion patients. He claims that in such circumstances, dismemberment of the fetus occurs on the outside of the woman's body and therefore would not fall within the statute's exception for D&E procedures generally. *See* Va. Code Ann. § 18.2-71.1(B) (excepting from the statute's ban the D&E procedure "involving dismemberment of the fetus prior to removal from the body of the mother").

As an initial matter, the district court erred by resolving, on summary judgment, the factual question of whether such a scenario ever actually occurs. Dr. Fitzhugh's own expert, Dr. deProsse, admitted that no medical literature mentions such an anatomical scenario. Moreover, both of Virginia's experts expressed similar doubts and even questioned the *possibility* that a woman's cervix could emerge beyond her vagina during a D&E procedure. Dr. Seeds testified that based on his overall clinical experience, he "would not expect to be able to pull a woman's cervix to the level of the vaginal introitus . . . unless the woman had extremely elastic ligaments as a result of multiple, full-term, vaginal deliveries or unless [he] was using too much force." Dr. Giles testified similarly and noted that he had never seen, read about, or heard about such a situation occurring during a D&E procedure. By disregarding this testimony and accepting Dr. Fitzhugh's, the district court violated a basic requirement for entering

summary judgment – that there be no genuine dispute of material fact.

Moreover, the court misconstrued the statute or chose to construe it so that it could be found unconstitutional in the factual circumstances it found to exist. This was error. *See United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909) (holding that when "a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter"). Dr. Fitzhugh explained that in the circumstances he described, the dismemberment that occurs during a D&E results from the fetus' passing through the cervix, and Dr. deProsse explained that the dismemberment might actually occur a few centimeters outside the woman's cervix. The district court chose to construe the statute as excepting the D&E procedure only when the dismemberment occurs inside the mother's body. Read more carefully (or so as to avoid constitutional questions), the statute excepts the D&E procedure so long as it is performed before the *fetus* is removed from the mother's body. *See* Va. Code Ann. § 18.2-71.1(B)(iii) (excepting from the statute's ban a D&E procedure "involving dismemberment of the fetus prior to removal from the body of the mother").

The district court also relied on a second factual scenario to find the statute unconstitutional – when the physician intends to perform a D&E involving dismemberment of the fetus inside the woman's body, but the fetus instead prolapses through the cervix intact and its skull becomes lodged in the woman's cervix. The court found that the physician would then have to crush the fetus' skull to complete the abortion, but by doing so, would

expose himself to criminal liability under the statute. Because a physician could not know before beginning the D&E procedure how far the fetus would prolapse, the court concluded that the statute unconstitutionally burdens the abortion right by creating a dilemma for the physician every time he performs a D&E procedure.

The problem with the district court's conclusion is that it had to resolve the major disagreement about the material facts in this case on a motion for summary judgment. As explained with respect to the need for a maternal health exception, *supra* at Part III, the question of whether the fetus' skull must be crushed at the point when the head has become lodged in the cervix is not resolved by the materials submitted by the parties, and a genuine dispute of material fact remains. Virginia's evidence showing that equally safe or even safer alternatives exist, including gently compressing the skull, using cervical muscle relaxants, and waiting for the cervix to dilate further, cannot be ignored or resolved by the court in the summary judgment procedure.

B

The district court struck down the statute also because it denies a woman a right to choose appropriate medical treatment when she is suffering from an incomplete miscarriage. In the case of a miscarriage, however, the cause of the fetus' demise is natural, and the doctor is called upon to treat the mother and assist in the natural process. In no ordinary sense can it be said that the physician engages in a "deliberate act that . . . is intended to kill a human infant who has been born alive." *See* Va. Code Ann. § 18.2-71.1(B). Even Dr. Fitzhugh's expert, Dr.

deProsse, testified that the physician's intent in treating an incomplete miscarriage would be to treat the mother and "preserve the health of the mother," not to kill the fetus.

C

Finally, the district court found the statute unconstitutional on vagueness grounds for failing to give physicians fair notice of what conduct it prohibits. A statute is unconstitutionally vague if it "fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits." *Chicago v. Morales*, 527 U.S. 41, 56 (1999).

Here, the district court found terms such as "from its mother," "from the body of the mother," "outside the body of the mother," and "involving dismemberment of the fetus prior to removal from the body of the mother" unconstitutionally vague. But its conclusion is unsupportable. Not only is it hard to imagine how a person of normal intelligence would not understand those everyday words, but the record demonstrates that Dr. Fitzhugh himself did not find them ambiguous. For example, when asked whether it would be medically advisable for him to "start dismembering the fetus, the part of the fetus that is already out of a woman," rather than express any confusion over the meaning of the question, Dr. Fitzhugh answered the question in the negative, without hesitation.

In sum, none of the additional grounds advanced by the district court to find the statute unconstitutional has merit.

V

Finally, I address Virginia's contention that the district court stacked the factual deck against it by improperly excluding from consideration material evidence that would have supported the statute and, more importantly, placed any factfinding by the district court deeper in doubt. In particular, Virginia contends that the district court erred in (1) striking the testimony of Virginia's expert, Dr. Harlan Giles; (2) striking portions of the testimony of Virginia's other expert, Dr. John Seeds; and (3) excluding testimony given before the United States House of Representatives Committee on the Judiciary during hearings on the federal partial-birth abortion ban. I address these in order.

A

Virginia proffered the testimony of Dr. Giles, an obstetrician and gynecologist specializing in maternal and fetal medicine, to support several parts of its defense, including the proposition that equally safe alternatives to any procedure banned by the statute exist. The district court struck all of Dr. Giles' testimony finding it to be "unreliable because it [was] inconsistent and incoherent." In particular, the district court found that Dr. Giles' testimony concerning the use of forceps to dislodge a fetal head and his experience using medication to achieve cervical dilation during D&E procedures contradicted testimony that Dr. Giles had given in a prior lawsuit. The district court relied primarily on this inconsistency to disqualify Dr. Giles.

It is of course well-established that under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993),

and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), a district court has an obligation to "ensure that any and all scientific testimony . . . is not only relevant, but reliable." *Daubert*, 509 U.S. at 589. Although the Supreme Court in *Kumho Tire* considered the inconsistency of an expert's testimony as a factor in not certifying the expert, the Court's overriding concern in that case was the unreliability of the method used by the expert. *Kumho Tire*, 526 U.S. at 157. In contrast, here, the inconsistencies in Dr. Giles' testimony constituted the district court's main reason for the exclusion. The inconsistencies, however, were between the testimony given by Dr. Giles in this case and the testimony given by Dr. Giles in an earlier case. Without exploring the reasons for any difference or allowing for an explanation, the district court incorrectly placed itself in the role of a factfinder, weighing the credibility of the witness.

The district court also supported its decision to exclude Dr. Giles' testimony with its conclusion that one method Dr. Giles advocated for completing an abortion in which the fetus' head became lodged in the mother's cervix – waiting awhile for the fetus' head to expel on its own – fell below the accepted standard of care. If true, such a finding might justify the conclusion that Dr. Giles' methods are unreliable within the meaning of *Kumho Tire*. Yet, to reach its conclusion that Dr. Giles' proposed methods would constitute malpractice, the court relied on the testimony of a witness that had been identified only as a rebuttal witness (because the witness could not testify on direct due to a conflict of interest). Moreover, even if the rebuttal witness' testimony was properly considered, it did not directly call into question Dr. Giles' method. Specifically, the rebuttal witness testified that it

would "constitute medical malpractice for a physician to 'just wait' for up to a *couple of hours* for the uterus to contract and the cervix to dilate on its own to remove a lodged fetal head during a previability D&E *where the woman is under any type of sedation.*" (Emphasis added). Dr. Giles specifically stated in his testimony, however, that he would not wait longer than 10 to 20 minutes for cervical dilation if the woman were under a general anesthetic. Finally, the testimony of Dr. Fitzhugh's own expert witness, Dr. deProsse, indicated that Dr. Giles' method would not be a breach of the standard of care, providing evidence that directly conflicted with the testimony of Dr. Fitzhugh's rebuttal witness. Dr. deProsse testified that a physician could wait as long as 24 hours after a fetal head became lodged without creating a risk of infection.

Finally, the district court supported its decision to strike the testimony of Dr. Giles by noting that Dr. Giles could not point to any medical literature to support his theory that cervical muscle relaxants could be used to dislodge a fetal head that had become lodged during a D&E procedure. Disqualifying Dr. Giles on this basis is particularly troubling because Dr. Fitzhugh's experts similarly failed to support several of their opinions with documented medical authority, yet the court chose to rely on them. For example, Dr. deProsse testified that the intact D&E procedure (also described as the dilation and extraction or D&X procedure) has safety advantages over conventional D&Es and other abortion procedures, but he could not recall any medical literature supporting that proposition. Similarly, Dr. deProsse testified that, depending on a woman's individual anatomy, her cervix might be outside her vaginal introitus at times during a D&E. Yet, Dr. deProsse knew of no medical literature documenting

that anatomical configuration. Notwithstanding the lack of medical literature to support Dr. deProsse's testimony, however, the district court considered and relied on it. The court's rejection of Dr. Giles' testimony for that reason created a double standard and was an abuse of discretion.

B

The district court also struck portions of the testimony of Virginia's other expert witness, Dr. John Seeds, based on the district court's finding that Dr. Seeds was an expert on neither abortions nor D&E procedures. Virginia relied on Dr. Seeds' testimony for his expert opinions on whether the health concerns raised by the appellees were medically legitimate, whether a physician would ever have to resort to a procedure that violated the statute, and whether there exists any safer alternative means for performing abortions than any procedure that would violate the statute. In addition, Dr. Seeds answered general questions about the female anatomy.

Again, the district court abused its discretion in excluding the testimony of Dr. Seeds, particularly with his credentials. Dr. Seeds is board-certified in the fields of obstetrics and gynecology ("OBGYN") and of maternal/fetal medicine. He is currently the chair of the OBGYN department at the Medical College of Virginia, Virginia Commonwealth University. He does not currently perform abortions, but he is familiar with the procedures performed by other physicians in his department. As chairman of the OBGYN department, Dr. Seeds testified that he would feel obligated to advise his staff professionally if the statute would implicate the staff's abortion practices in any way.

The district court concluded solely from the fact that Dr. Seeds does not perform abortions that his testimony in this matter is unreliable. But as an OBGYN expert, Dr. Seeds obviously knows more about the female anatomy, pregnancy, and birth than the average juror. In fact, Dr. Seeds, as an expert in maternal/fetal medicine, may actually be more qualified to render an opinion than Dr. Fitzhugh's experts, neither of whom has expertise in maternal/fetal medicine. As a maternal/fetal medicine specialist, Dr. Seeds has extensive training in the management of high-risk pregnancies, which makes him highly qualified to speak to possible complications occurring during pregnancy that could necessitate the types of procedures banned by the statute.

The exclusion of Dr. Seeds' testimony is so highly irregular that it is difficult for me to conceive of the motive for the district court's ruling. In any event, I think it clear that the district court abused its discretion in excluding Dr. Seeds' testimony.

C

Finally, the district court excluded parts of the Congressional Record for the federal partial-birth abortion ban as evidence that such a ban would not endanger a woman's health. This exclusion covered all parts of the Congressional Record, including the House Committee Report and the congressional testimony of Dr. Mark Neerhof, an OBGYN professor at Northwestern University Medical School. Specifically, the district court found that the report was "political" and "untrustworthy" and that Dr. Neerhof's statement was hearsay.

Although it was within the district court's discretion to conclude that the Congressional Report was unreliable, the district court again applied a double standard to reach such a conclusion. In particular, the court repeatedly relied on hearsay statements made by the American College of Obstetricians and Gynecologists ("ACOG"), which were presented by Dr. Fitzhugh. I can see no relevant difference between Dr. Neerhof's testimony before Congress and the ACOG statements. If the district court chose to exercise its discretion to exclude such testimony, then it should have done so across the board. If it chose to include them as legislative facts, then it should have done so uniformly. Its ruling against Virginia only, however, is, I submit, unexplainable and an abuse of discretion.

VI

The choice made today by the majority to strike down Virginia's partial-birth infanticide statute is not compelled by the Constitution, nor by any Supreme Court case. As such, the majority opinion stands on its own reasoning and amounts to a momentous step in disconnecting our law from accepted moral norms. In gratuitously rejecting Virginia's law, the majority announces a strange law that the liberty protected by the Constitution guarantees a woman the right to destroy her live fetus after it has been delivered halfway or fully into the world. The majority opinion stands for nothing less.

Virginia enacted its partial-birth infanticide statute, focusing on the life of infants delivered halfway or fully into the world, rather than on abortion procedures themselves. Indeed, it accepted as legal various "normal" procedures employed in over 95% of abortions in America.

Virginia's statute is thus narrowly drafted and fits within the exceptions recognized by *Carhart*. *See Carhart*, 530 U.S. at 939 ("[I]t would have been a simple matter, for example, to provide an exception for the performance of D&E and other abortion procedures"); *id.* at 950 (O'Connor, J., concurring) ("[S]ome other States have enacted statutes more narrowly tailored . . . by specifically excluding from their coverage the most common methods of abortion, such as the D&E and vacuum aspiration procedures"). This was Virginia's specific goal.

It is an affront to Virginia's sovereignty to extend *Carhart* to strike down its statute in the name of the liberty protected by the Constitution. It should make us question whether we understand liberty, or if we do, whether we are tarring it with the color of political ideology that tarred the national ideals of other ages when immoral laws were imposed by ideological commands. It provides us no cover to assert vacuously that we are doing what the Supreme Court commands. The truth remains open for all to see that we are doing not what is required by law, as I have demonstrated in some detail, but what we will.[5]

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[5] In suggesting that I am "mandat[ing] [my] own moral code" as I write to uphold Virginia's statute, *ante* at 17, the majority presumes that the Supreme Court has, in *Carhart*, protected conduct that violates "my moral code" and that I should address my objections to the Supreme Court's decision in *Carhart*. The Nebraska statute found unconstitutional in *Carhart*, however, differs materially from the Virginia statute, most significantly in that the former proscribed certain abortion *procedures* while the latter bans only the destruction of living fetuses. With this material difference, I have suggested that we can, consistent with Supreme Court precedent, accommodate Virginia's deeply held moral position without offending *Carhart*, and that in going beyond the bounds of the *Carhart* holding to strike down the Virginia

(Continued on following page)

As it must, judicial authority finds process and reason as its supporting pillars, but reason alone applied formulaically and without regard to context can wring results that even the most carefully reasoning decisionmaker finds unacceptable. At the depths of judicial decisionmaking lies a bedrock demanding accountability to the mind's sense of right, and this bedrock guides or perhaps even vetoes whatever absurdities reason might deliver.

In the opinions we issue today, we speak of the legal and the illegal ways to dismember the arms and legs of human fetuses and the legal and illegal ways to crush the budding human head. The doctors, of course, are given a choice: They can insert scissors into the base of the neck and suck out the brain matter, or they can crush the tender skull with forceps. Indeed, some of these procedures remain legal under Virginia's statute, but the statute does prohibit the destruction of a fetus halfway or fully delivered from its mother's body. Dr. Fitzhugh complained of this proscription because – even though killing the infant could not affect the mother's health at that stage – he could not complete his job. He said, "I don't want a live birth." The majority redresses his complaint with the ruling today.

Even the majority's opinion, however, seems to have shuddered at discussing the nuances of fetal destruction, employing uncommon and clinical words as if they would dull the moral context:

> In the case of a vertex presentation, the physician collapses the fetal calvarium and then

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statute, we trample not only the statute but also the moral grounds on which it rests.

> extracts the entire fetus through the cervix. In the case of a breech presentation, the physician pulls the fetal trunk through the cervix, collapses the fetal calvarium, and then completes extraction of the fetus through the cervix. *Ante* at 6.
>
> * * *
>
> A third variation prohibited by the Act involves the D&E in which fetal disarticulation occurs outside of the woman's body. Disarticulation generally occurs beyond the cervical os (the lower portion, or opening, of the cervix) as a result of traction against the cervix. However, disarticulation may occur outside of the woman's body when there is little or no space between the cervical os and the vaginal introitus (the vaginal canal) or when the cervical os prolapses (emerges) outside the vaginal introitus. *Ante* at 6.

I too have shuddered and must turn away.

Can we not see that our discussions and the law we make in striking down Virginia's prohibition are unfit for the laws of a people of liberty? I wonder with befuddlement, fear, and sadness, how we can so joyfully celebrate the birth of a child, so zealously protect an infant and a mother who is pregnant, so reverently wonder about how human life begins, grows, and develops, and at the same time write to strike down a law to preserve a right to destroy a partially born infant. If the disconnect is explained by personal convenience, then we must reason that all morality is personal, without commonality and source. The product of such chaos is unfathomable.

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301 F.Supp.2d 499

United States District Court,
E.D. Virginia,
Richmond Division.

RICHMOND MEDICAL CENTER FOR WOMEN, et al., Plaintiffs,

v.

David M. HICKS, et al., Defendants.

No. CIV.A.03CV531.

Feb. 2, 2004

Susan Ann Kessler, Blackburn Conte Schilling & Click PC, Richmond, VA, Suzanne Novak, Priscilla Smith, Nan E. Strauss, New York City, for plaintiffs.

James Christian Stuchell, Siran S. Faulders, Office of the Attorney General, Edward Meade Macon, Assistant Attorney General, Edward Joseph McNelis, III, Rawls & McNelis PC, Richmond, VA, for defendants.

MEMORANDUM OPINION

RICHARD L. WILLIAMS, Senior District Judge.

This matter is before the Court on the plaintiffs' motion for summary judgment. Also pending are plaintiffs' motions to strike (1) selected portions of Dr. Giles' sworn testimony; (2) selected portions of Dr. Seeds' sworn testimony; and (3) exhibits and other documents. The defendants have responded, the plaintiffs have filed replies, the Court has heard oral argument, and this matter is ripe for adjudication.

I. FACTS

The Court finds that the following facts are undisputed by evidence in the record.

Statutory Provisions

1. Chapters 961 and 963 of the 2003 Acts of the Virginia General Assembly, codified at Va.Code Ann. § 18.2-71.1 ("the Act"), make it a Class 4 felony for a person to knowingly perform "partial birth infanticide."

2. In Virginia, a Class 4 felony carries a prison term of up to ten years, and a fine of up to $100,000. Va.Code Ann. § 18.2-10.

3. The Act defines "partial birth infanticide" to mean:

> any deliberate act that (i) is intended to kill a human infant who has been born alive, but who has not been completely extracted or expelled from its mother, and that (ii) does kill such infant, regardless of whether death occurs before or after extraction or expulsion from its mother has been completed.

Va.Code Ann. § 18.2-71.1(B).

4. The Act provides the following list of exceptions from that definition:

> The term "partial birth infanticide" shall not under any circumstances be construed to include any of the following procedures: (i) the suction curettage abortion procedure, (ii) the suction aspiration abortion procedure, (iii) the dilation and evacuation abortion procedure involving dismemberment of the fetus prior to removal from

> the body of the mother, or (iv) completing delivery of a living human infant and severing the umbilical cord of any infant who has been completely delivered.

Va.Code Ann. § 18.2-71.1(B).

5. The Act defines the phrase "human infant who has been born alive" as follows:

> "human infant who has been born alive" means a product of human conception that has been completely or substantially expelled or extracted from its mother, regardless of the duration of pregnancy, which after such expulsion or extraction breathes or shows any other evidence of life such as beating of the heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, whether or not the umbilical cord has been cut or the placenta is attached.

Va.Code Ann. § 18.2-71.1(C).

6. The Act defines the phrase "substantially expelled or extracted from its mother" as follows:

> in the case of a headfirst presentation, the infant's entire head is outside the body of the mother, or, in the case of breech presentation, any part of the infant's trunk past the navel is outside the body of the mother.

Va.Code Ann. § 18.2-71.1(D).

7. Subsection E of the Act provides a limited exception for the life of the woman:

> This section shall not prohibit the use by a physician of any procedure that, in reasonable medical judgment, is necessary to prevent the death

> of the mother, so long as the physician takes every medically reasonable step, consistent with such procedure, to preserve the life and health of the infant. A procedure shall not be deemed necessary to prevent the death of the mother if completing the delivery of the living infant would prevent the death of the mother.

Va.Code Ann. § 18.2-71.1(E).

8. The Act contains no exception to its prohibition of steps taken to complete an abortion or other medical procedure "where it is necessary, in appropriate medical judgment for the preservation of the . . . health of the mother." *Stenberg v. Carhart*, 530 U.S. 914, 931, 937, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000); Va.Code Ann. § 18.2-71.1.

9. The Virginia General Assembly rejected amendments to the Act that would have provided an exception for some circumstances when the woman's health was at risk. *See* H.B. 1541, Governor's recommendation, received by House 3/24/03, rejected 4/02/03, 2003 Sess. (Va.2003); S.B. 1205, Governor's recommendation, received by Senate 3/24/03, rejected 4/02/03, 2003 Sess. (Va.2003) (Appendix to plaintiffs' motion for summary judgment, Tabs 4 & 5 ("Pls' App. Tab ___")).

10. The Act applies throughout pregnancy, regardless of the gestational age or viability of the fetus. Va.Code Ann. § 18.2-71.1

11. The Virginia House of Delegates rejected amendments offered to limit the Act's abortion ban to post-viability abortions. *See* H.B. 1541, Amendments 1 and 2 by Del. Ioannou, rejected by House 1/31/03, 2003 Sess. (Va.2003) (Pls' App. Tab 5).

The Applicable Medical Practices

12. Plaintiff Richmond Medical Center ("RMCW") is located in Richmond and also operates a facility in Roanoke and in Newport News. These facilities provide a variety of reproductive health services and gynecological and obstetrical medical services including evacuating the products of conception for women who have had miscarriages and are in need of such assistance. (Fitzhugh Decl. ¶ 10 (Pls' App. Tab 6).) *See also* 8/22/03 Order, Findings of Fact ("FF") ¶ 10.

13. Plaintiff Dr. William G. Fitzhugh is board-certified in obstetrics and gynecology and is licensed to practice medicine in Virginia (Fitzhugh Decl. ¶ 1.) Dr. Fitzhugh is and has been the Medical Director of RMCW for more than 25 years. He also has a private practice in obstetrics and gynecology. (Fitzhugh Decl. ¶ 9.) He is also a clinical instructor in the Department of Obstetrics and Gynecology at Virginia Commonwealth University's Medical College of Virginia, located in Richmond, where he provides clinical training to medical students and residents. (*Id.*)

14. Dr. Fitzhugh performs abortions and treats women who are experiencing incomplete miscarriages at RMCW and at hospitals in the City of Richmond and the County of Henrico. Dr. Fitzhugh's patients come from all parts of Virginia, and some patients come from out of state. (Fitzhugh Decl. ¶¶ 10, 13;) 8/22/03 Order, FF ¶ 11.

15. In some of the cases of women experiencing incomplete miscarriages, the fetus is positioned in the woman's vagina and may show signs of life. Because the umbilical cord of a first and early second-trimester fetus is very short, the safest and most medically appropriate way

to complete such a miscarriage is to separate the umbilical cord in order to remove the fetus. (Fitzhugh Decl. ¶ 29.)

16. With respect to his abortion practice at RMCW, Dr. Fitzhugh provides abortions up to thirteen (13) weeks as measured from the first day of the woman's last menstrual period ("lmp"). (Fitzhugh Decl.¶ 10.) He provides abortions through twenty (20) weeks lmp at hospitals within the City of Richmond and at a hospital in the County of Henrico. (*Id.*)

17. The most common abortion method is the suction curettage or suction aspiration method, in which the physician dilates the woman's cervix, inserts a tube (cannula) through the woman's vagina and into her uterus, and suctions the embryo or fetus and other products of conception through the woman's cervix and vagina. (Fitzhugh Decl. ¶ 15; deProsse Decl. ¶ 20 (Pls' App. Tab 7).) *See also* 8/22/03 Order, FF ¶ 12. This method is generally used prior to 14 weeks lmp. (*Id.*)

18. The Act excludes the suction curettage and suction aspiration procedures from criminal liability. Va.Code Ann. § 18.2-71.1.

19. After approximately 14 weeks, the fetus is generally too large to remove by suction alone. (Fitzhugh Decl. ¶ 17; deProsse Decl. ¶ 21.) *See also* 8/22/03 Order, FF ¶ 14. Dilation and evacuation ("D & E") is the most common method of pre-viability second-trimester abortion, accounting for approximately 96% of all second-trimester abortions in the United States. (deProsse Decl. ¶ 21.) *See also* 8/22/03 Order, FF ¶ 15; *Carhart*, 530 U.S. at 924, 120 S.Ct. 2597. As this Court has recognized, the D & E procedure "represents a significant advance in second-trimester abortions."

Richmond Med. Ctr. for Women v. Gilmore, 55 F.Supp.2d 441, 480 (E.D.Va.1999).

20. In *Carhart*, the Supreme Court provided a general description of the D & E method. Generally, that method includes the following steps: "(1) dilation of the cervix; (2) removal of at least some fetal tissue using nonvacuum instruments; and (3) (after the 15th week) the potential need for instrumental disarticulation or dismemberment of the fetus or the collapse of fetal parts to facilitate evacuation from the uterus." 530 U.S. at 925, 120 S.Ct. 2597.

21. The steps taken by a physician performing a D & E are substantially the same today as they were when the Supreme Court decided *Carhart*, striking down a statute similar to the one at issue in this case, and the same as when this Court decided *Richmond Med. Ctr. v. Gilmore.* (Giles Dep. 166:21-24 (Pls' App. Tab 2).)

22. When performing a pre-viability D & E procedure, Dr. Fitzhugh typically dilates the woman's cervix with multiple intracervical osmotic dilators, which not only expand the cervix, but also cause it to change forms so that it will be a softer, more open organ. (Fitzhugh Decl. ¶ 17; *see also* deProsse Decl. ¶ 22.) He then removes the products of conception, including the pre-viable fetus, from the woman's uterus using a combination of suction and forceps. (Fitzhugh Decl. ¶¶ 17, 19; deProsse Decl. ¶ 22; *see also* Giles Dep. at 29:16-23.)

23. In order to remove the fetus during a D & E, Dr. Fitzhugh generally uses a speculum to hold the vagina open and uses a tenaculum to apply traction to the cervix in order to stabilize it. The tenaculum also serves to hold the cervix closer to the vaginal introitus, or opening.

(Fitzhugh Decl. ¶ 18; *see also* deProsse Dep. at 57:15-61:17 (Pls' App. Tab 8); Christmas Decl. ¶ 12 (Pls' App. Tab 9).)

24. Depending on the specific woman's body and the use of instrumentation during the D & E, at that point the woman's cervix may be further inside her body than her vagina, resulting in space between her cervical os and the vaginal introitus; it may be pulled down to the point such that the cervical os is in line with the vaginal introitus, such that there is no space between the two; or it may even be further outside the woman's body than the vaginal introitus. (Fitzhugh Dep. at 52-61; Fitzhugh Decl. ¶ 18; *see also* deProsse Decl. ¶ 24; deProsse Dep. at 60:16-61:9; Christmas Decl. ¶ 13; *see also* Seeds Dep. at 95:23-96:14 (Pls' App. Tab 10);) 8/22/03 Order, FF ¶ 18. Dr. Fitzhugh estimates that this situation occurs with one-third of his patients (Fitzhugh Dep. at 52-61); 8/22/03 Order, FF ¶ 28. Such an occurrence is not limited to situations in which the woman has had multiple previous vaginal deliveries or where the physician uses too much force. (Christmas Decl. ¶ 13; Fitzhugh Dep. at 52-61.)

25. Defendants' experts do not regularly have occasion to use a tenaculum either in performing D & E's or in performing any other type of procedure on a patient in the second trimester of pregnancy. (Seeds Dep. at 95:6-22; Giles Dep. at 55:3-57:3.)

26. Defendants' expert Dr. Seeds agrees that the natural distance between the cervical os and the vaginal introitus varies from patient to patient, and in fact, in some women the cervical os and the vaginal introitus are within one or two centimeters of each other. (Seeds Dep. at 95:23-96:14.)

27. To evacuate the uterus in a D & E, Dr. Fitzhugh places a suction tube into the uterus to remove the amniotic fluid. Frequently, the suction will cause part of the fetus, such as an arm, leg or the umbilical cord, to prolapse (or emerge) out of the uterus and into the vagina or outside the vagina. (Fitzhugh Decl. ¶ 19; deProsse Decl. ¶ 22); 8/22/03 Order, FF ¶ 19. Dr. Fitzhugh will then employ forceps to grasp part of the pre-viable fetus. He will either grasp the part that has prolapsed, or, if none has prolapsed, he will insert the forceps into the uterus and grasp a part there. (Fitzhugh Decl. ¶ 19; *see also* deProsse Decl. ¶ 22). Regardless, he will then pull the forceps towards him. A part of the fetus will be through, or brought through, the cervical os. (Fitzhugh Decl. ¶ 19; *see also* deProsse Decl. ¶ 23.) During the course of all D & E's, all of the products of conception will be drawn or expelled through the cervical os and "outside the body" of the woman. (Fitzhugh Decl. ¶ ¶ 19, 32-33; deProsse Decl. ¶ 22.) The traction of the fetus against the cervix caused by this pulling usually causes that part of the fetus in the vagina to break off from the rest of the fetus. (Fitzhugh Decl. ¶ 19; deProsse Decl. ¶ 23.) As this Court has recognized, it is not uncommon for the disarticulation during a D & E to occur outside of the uterus, several centimeters outside the external cervical os. (Fitzhugh Decl. ¶ 19; deProsse Decl. ¶ 23; deProsse Dep. at 54:21-55:17; Giles Dep. at 51:11-16.) *See also* 8/22/03 Order, FF ¶¶ 19, 28; *Carhart*, 530 U.S. at 925-26, 120 S.Ct. 2597; *Richmond Med. Ctr.*, 55 F.Supp.2d at 472. Disarticulation in the uterus is more dangerous to the woman because it would require more instrumentation within the uterus and could generate sharp fragments of fetal tissue within the uterus, increasing the risk of internal damage to the patient.

(Fitzhugh Decl. ¶ 19; deProsse Decl. ¶ 26.) *See also* 8/22/03 Order, FF ¶ 19; *Richmond Med. Ctr.*, 55 F.Supp.2d at 472.

28. Based on the different possible presentations of the cervix described above, (*supra* ¶¶ 23-24, 26), such dismemberment may occur in the vagina or outside of the vagina. (Fitzhugh Decl. ¶ 19; deProsse Decl. ¶¶ 23-24) At that point, the fetus may show signs of life, such as a heartbeat or a pulsating umbilical cord. (Fitzhugh Decl. ¶ 21; deProsse Decl. ¶ 22.)

29. Sometimes during a D & E, however, Dr. Fitzhugh removes the fetus intact or largely intact. (Fitzhugh Decl. ¶ 20; deProsse Decl. ¶ 25; Giles Dep. at 52:1-8.) *See also* 8/22/03 Order, FF ¶ 20; *Richmond Med. Ctr.*, 55 F.Supp.2d at 453. This can occur when the cervix dilates to a greater extent than he had anticipated. (Fitzhugh Decl. ¶ 20). Again, the pre-viable fetus may show signs of life at that point. (Fitzhugh Decl. ¶ 21; deProsse Decl. ¶¶ 22, 25.)

30. Regardless of whether the fetus remains intact, if the fetal calvarium (skull) is too large to pass through the cervix, Dr. Fitzhugh compresses it in order to complete the procedure in the manner that is safest for the patient. (Fitzhugh Decl. ¶¶ 20, 33; *see* deProsse Decl. ¶¶ 22, 25; deProsse Dep. at 82:6-83:13; Christmas Decl. ¶ 8.) *See also* 8/22/03 Order, FF ¶ 21; *Carhart*, 530 U.S. at 925, 120 S.Ct. 2597 (physicians may need to collapse fetal parts to facilitate evacuation from uterus); (Dep. of Harlan Giles, Apr. 13, 1999, *in Planned Parenthood v. Doyle* ("Giles Dep. (*Doyle*)") at 110:4-22 (testifying that forceps would be his first choice in order to facilitate the removal of a lodged fetal skull of a pre-viable fetus) (Pls' App. Tab 11).)

31. The record demonstrates that intact D & E's have many safety advantages over D & E's involving

dismemberment. *See* 8/22/03 Order, FF ¶ 32. In a D & E in which the physician dismembers the fetus, sharp instruments and sharp fetal fragments may damage the woman's uterus. (deProsse Decl. ¶ 26.) When the fetus remains intact during a D & E, the risks of uterine perforation, cervical rupture, infection, and retained fetal tissue are reduced. (Fitzhugh Decl. ¶ 20; deProsse Decl. ¶ 26;) *see also* 8/22/03 Order, FF ¶¶ 19, 20. That is so because the procedure is less invasive; an intact fetus allows the physician to avoid the repeated insertion of sharp instruments into the woman's uterus, and the fetus passes through the birth canal intact. (Fitzhugh Decl. ¶ 20; deProsse Decl. ¶ 26.) *See also Richmond Med. Ctr.*, 55 F.Supp.2d at 453. Moreover, because the procedure takes less time to complete when the fetus comes through the cervix intact, it may also result in less blood loss and less trauma for some patients; and it may have advantages when a physician needs an intact fetus for an autopsy to assess the risk of recurrence of a fetal anomaly. (Fitzhugh Decl. ¶ 20; deProsse Decl. ¶ 26.) It is unadvisable for a physician to try to dismember parts of a fetus after it has come through the woman's cervix largely intact. (deProsse Decl. ¶ 26.) *See also* 8/22/03 Order, FF ¶ 20; *Richmond Med. Ctr.*, 55 F.Supp.2d at 454. Such actions would present unnecessary risks to the woman and would provide no benefit. (deProsse Decl. ¶ 26; *see also* Giles Dep. at 50:25-51:1 ("[I]f there is no need for dismemberment, it's pointless to dismember.").)

32. However, in advance of beginning a procedure, neither Dr. Fitzhugh nor other physicians performing D & E's can know whether the fetus will dismember or remain intact, and exactly what operative steps will be necessary to remove a fetus. (Fitzhugh Decl. ¶ 22; Fitzhugh

Dep. at 81:21-82:9; 100:3-19; *see also* Giles Dep. at 51:17-22.) Rather, a physician must adapt his or her technique, depending on the individual patient's needs, including the condition of the patient, the amount of dilation, the presentation and size of the fetus, and other medical factors. (Fitzhugh Decl. ¶ 2;) *see also* 8/22/03 Order, FF ¶ 18; (Seeds Dep. at 20:6-13). The exact manner in which Dr. Fitzhugh performs a D & E varies depending on an individual woman's needs and on his own preferences, as informed by his experience, skills and judgments about the woman's health. (Fitzhugh Decl. ¶ 22; *see* deProsse Decl. ¶¶ 24-25, 41, 47, 57.) Defendants' expert Dr. Giles agrees that it is important that Dr. Fitzhugh and other physicians have the flexibility to adjust their surgical techniques based on those factors. (Giles Dep. at 128:5-129:6; *see also* deProsse Decl. ¶¶ 41, 57.)

33. Defendants' expert Dr. Giles has agreed that the manner in which Dr. Fitzhugh performs D & E procedures is medically appropriate. (Giles Dep. at 92:21-94:7; *see also id.* at 84:9-85:6, 85:24-86:5).

34. Substantial medical authority, including testimony from defendants' experts, supports the proposition that banning D & E's, and the manner in which Dr. Fitzhugh performs D & E's, including intact D & E's, could endanger women's health. (Fitzhugh Decl. ¶¶ 19-20, 22-24, 33; deProsse Decl. ¶ 22-26, 41, 44-46, 50-55, 57; deProsse Dep. at 82:6-83:13; Christmas Decl. ¶ 8; Giles Dep. at 84:9-85:6, 85:24-86:5, 92:21-93:20, 128:15-129:6 (procedure is safe and medically appropriate and flexibility in performing procedure is important for woman's health);) *see also* 8/22/03 Order, FF ¶ 31; *Carhart*, 530 U.S. at 936-37, 120 S.Ct. 2597 (concluding that substantial medical authority, including statements from the

American College of Obstetricians and Gynecologists, supports proposition that banning intact D & E's would endanger women's health such that Constitution would require ban on such procedures to contain a health exception); *Richmond Med. Ctr.*, 55 F.Supp.2d at 453-54.

35. Certain circumstances during a D & E may endanger the woman's health, but not necessarily her life. (Trial Testimony of Harlan Giles, May 7, 1997, in *Evans v. Kelley* ("Giles Trial Test. (*Evans*)") at 146:19-23 (Pls' App. Tab 12).)

36. There is a variation of the D & E method called "D & X" (dilation and extraction), where the fetus is removed largely intact, after the physician intentionally converts the fetus to a breech presentation. *Carhart*, 530 U.S. at 928, 120 S.Ct. 2597. "Intact D & E's" and "D & X's" are similar. *Id.* (finding it appropriate to use terms "intact D & E" and "D & X" interchangeably).

37. Besides D & E's, induction is the only other commonly used second-trimester abortion method, accounting for less than 4% of second-trimester abortions nationwide. (deProsse Decl. ¶¶ 21, 27;) *see also* 8/22/03 Order, FF ¶ 15; *Carhart*, 530 U.S. at 924, 120 S.Ct. 2597.

38. Induction is essentially a medically induced, preterm labor in which the woman has contractions and eventually, after 12 to 30 hours, expels the pre-viable fetus. (deProsse Decl. ¶¶ 27, 50.)

39. Some inductions require a separate, additional procedure, usually dilation and curettage, to complete the removal of the products of conception. (deProsse Decl. ¶ 50.) Further, when an induction is unsuccessful or incomplete, the patient may also require a D & E in order

to complete the procedure. (deProsse Decl. ¶ 9;) 8/22/03 Order, FF ¶ 24.

40. Inductions generally cannot be performed prior to 16 weeks lmp and are medically contraindicated for women with certain medical conditions such as severe cardiac ailments, pelvic infection, or prior Cesarean sections. (deProsse Decl. ¶¶ 28, 52; Seeds Dep. at 78:19-79:3.) Medical literature indicates that D & E's are statistically safer than inductions. (deProsse Decl. ¶¶ 51-54;) *see also Richmond Med. Ctr.*, 55 F.Supp.2d at 456-57, (Giles Dep. at 109:12-112:24.)

41. Induction abortions involve the same medical complications as labor and delivery at full-term. (deProsse Decl. ¶ 50; *see also* Giles Dep. at 119:2-8.) Certain complications are also associated with each specific method of induction, and the injections sometimes used to induce the pre-term labor themselves also have contraindications. (deProsse Decl. ¶¶ 27, 53-54.)

42. The risk of any abortion procedure depends to some extent on the skill of the provider at implementing that type of procedure. (deProsse Decl. ¶¶ 45, 47; Giles Dep. at 128:5-8.)

43. Since 1980, Dr. Fitzhugh has performed inductions in only a few instances. (Fitzhugh Decl. ¶ 23.)

44. Defendants' expert, Dr. Giles, agrees that in a situation when the physician has not performed an induction in many years, the doctor should have the flexibility to perform a D & E in the manner that is safe and medically appropriate. (Giles Dep. at 128:5-129:6; *see also* deProsse Decl. ¶¶ 25, 41, 51, 57.)

45. Two older methods of abortion are hysterotomy and hysterectomy, which are very rarely used today. (deProsse Decl. ¶ 21; Fitzhugh Decl. ¶¶ 23-24; Seeds Dep. at 85:20-86:16;) *see also* 8/22/03 Order, FF ¶ 16. Hysterotomy is a pre-term Cesarean section. (Fitzhugh Decl. ¶ 24; deProsse Decl. ¶¶ 29, 56; *see also* Seeds Dep. at 85:10-16.) Hysterectomy is the removal of the uterus, and it leaves the woman unable to bear children. (Fitzhugh Decl. ¶ 24; deProsse Decl. ¶ 29; *see also* Seeds Dep. at 85:18-19.) Both are significantly riskier in terms of a woman's mortality and morbidity than other abortion procedures and are not medically acceptable abortion procedures except in very rare circumstances when they are specifically medically indicated. (Fitzhugh Decl. ¶ 24; deProsse Decl. ¶ 55; Seeds Dep. at 85:25-86:12; Giles Dep. 123:25-124:7.) *See also Richmond Med. Ctr.*, 55 F.Supp.2d at 457. Because both involve abdominal removal, rather than vaginal delivery, of the fetus, neither of these riskier methods appears to be affected by the Act.

Effect of the Act on Dr. Fitzhugh's Practice

46. Dr. Fitzhugh both performs D & E's and completes first trimester miscarriages in which he encounters various factual scenarios whereby completing the procedure on a pre-viable fetus in the safest, most medically appropriate manner will constitute the crime of "partial birth infanticide." (Fitzhugh Decl. ¶¶ 2, 25-34; *see also* deProsse Decl. ¶¶ 22-26.) *See also* 8/22/03 Order, FF ¶ 25.

47. Dr. Fitzhugh may violate the Act by completing a miscarriage for a patient. Sometimes Dr. Fitzhugh must complete a miscarriage for a woman who presents in his office mid-miscarriage with the fetus positioned in her

vagina. (Fitzhugh Decl. ¶ 29.) The fetus at that point will show signs of life. Because the umbilical cord is not long in early gestations, in such circumstances he must and does deliberately separate the umbilical cord in the vagina before then removing the fetus, an act that is intended to and will "kill" the fetus. (*Id.*) In such a situation, Dr. Fitzhugh would violate the Act when completing a miscarriage for a woman in this safe and medically appropriate manner. (*Id.*) *See also* 8/22/03 Order, FF ¶ 30.

48. In performing a D & E, Dr. Fitzhugh, like all physicians, always intends to remove the fetus from the woman, and with a nonviable, living fetus, this act will, by definition, result in fetal demise. (Fitzhugh Decl. ¶¶ 17, 21; Seeds Dep. at 71:2-5.) *See also* 8/22/03 Order, FF ¶ 26. As discussed in more detail in the paragraphs below, in order to complete the abortion in a safe and medically appropriate manner, Dr. Fitzhugh may be required to perform "a deliberate act that is intended to kill" the fetus and that "does kill" the fetus, in a way that may *not* "involv[e] dismemberment of the fetus prior to removal from the body of the mother." (Fitzhugh Decl. ¶¶ 30, 32-34.) *See also* 8/22/03 Order, FF ¶ 26.

49. One situation in which Dr. Fitzhugh may violate the Act occurs during a D & E that involves dismemberment when he is presented with a situation that is not uncommon in his practice – where there is little or no space between the cervix and the vaginal introitus. (Fitzhugh Decl. ¶¶ 18, 32; Fitzhugh Dep. at 52-61; *see* deProsse Dep. at 60:16-61:9.) *See also* 8/22/03 Order, FF ¶ 28. If dismemberment occurs while Dr. Fitzhugh is pulling the fetus through the cervical os with forceps, it will generally occur beyond the cervical opening, (*supra*, ¶ 27), and – if the cervix is close to or outside of the vaginal introitus –

beyond the vaginal introitus, thus "outside the woman's body." (Fitzhugh Decl. ¶¶ 18-19, 32; deProsse ¶¶ 23-24; *supra*, ¶ 28.) Because disarticulation of the fetus does not always cause immediate fetal demise, the fetus may still show "evidence of life" when the part of the body specified in the Act (the head or some part of the trunk beyond the navel) is "outside the body" of the woman, and a deliberate act, such as compression of the fetal skull, transecting the umbilical cord, or dismemberment is performed at that point to complete the procedure. (Fitzhugh Decl. ¶¶ 18, 30-32; deProsse ¶¶ 22-24.) A D & E completed in such a manner would violate the Act.

50. It is also unclear to Dr. Fitzhugh what "dismemberment" encompasses in subsection B of the Act, the subsection that makes an exception to its prohibitions for D & E procedures "involving dismemberment of the fetus prior to removal from the body of the mother." (Fitzhugh Decl. ¶ 31.) He is unsure whether, if a finger disjoins from the fetus, the abortion he performed automatically falls under the exception to the Act, or must more of the fetus be dismembered? Additionally, Dr. Fitzhugh does not know whether "prior to removal from the body of the mother" means prior to the removal of the entire fetus or only part thereof. (*Id.*) If the Act were interpreted to mean any part of the fetus, then very few D & E's he performs would fall under that exception. And if the exception applies to fetuses that have been dismembered prior to removal of only part of the fetus, it is unclear how much of the fetus must still be in the "body of the mother" for the exception to apply. (*Id.*)

51. Another scenario that may occur while Dr. Fitzhugh performs a D & E that would put him in violation of the Act is when dilation causes the fetus to pass

through the cervix intact or largely intact. (*See* Fitzhugh Decl. ¶¶ 20, 33-34; *see also* deProsse Decl ¶¶ 22, 25.) Because the skull is the largest part of the fetus, it is often too large to pass safely through the woman's cervical os. (deProsse Decl. ¶ 22; Fitzhugh Decl. ¶¶ 20, 33; Christmas Decl. ¶ 8.) Thus, Dr. Fitzhugh often needs to compress the head of the pre-viable fetus showing evidence of life using forceps, thereby performing a "deliberate act" that is "intended to kill" and "does kill" the fetus, in order to complete the abortion of what is defined under the Act as a "human infant born alive." (Fitzhugh Decl. ¶¶ 20, 33-34; deProsse Decl. ¶¶ 22, 25.) *See also* 8/22/03 Order, FF ¶ 29; *Richmond Med. Ctr.*, 55 F.Supp.2d at 454 ("Intact removal of a previable fetus, by definition, kills the fetus."); *id.* at 454-55 (noting that "Dr. Fitzhugh has removed an intact fetus during a D & E"and that "[t]hese circumstances can and do occur not infrequently").

52. Defendants concede that Dr. Fitzhugh may violate the Act when performing a D & E where the fetus comes out intact or largely intact. (Defs.' Mem. in Opp. to Pl's. Mot. for T.R.O. & Prelim. Inj. at 9-10 ("Def. Opp. to TRO"); 8/14/03 Tr. 11:11-16 (Pls' App. Tab 13).) *See also* 8/22/03 Order, FF ¶ 25.

53. Because Dr. Fitzhugh could face criminal prosecution under the Act for some D & E's he performs, Dr. Fitzhugh faces the possibility of such prosecution every time he performs a D & E abortion since there is no way for him to know before he begins any given D & E whether that particular D & E will result in a situation where he must take steps in violation of the Act in order to complete the procedure in the manner he deems most appropriate for the woman's health. (Fitzhugh Decl. ¶ 2; Fitzhugh Dep.

at 81:21-82:9; *see also* deProsse Decl. ¶¶ 41, 57, Giles Dep. at 51:17-22;) 8/22/03 Order, FF ¶ 27; *supra*, ¶¶ 32-33.

54. If the Act takes effect, Dr. Fitzhugh would have to choose between continuing to practice medicine in the manner that is safest for his patients and risk jail, or stopping his performance of second-trimester abortions and certain other procedures. (Fitzhugh Decl. ¶ 40.)

Defendants' Lack of Relevant or Credible Evidence

55. Defendants submitted a declaration of Dr. Giles in which he avers that in *one* situation Dr. Fitzhugh encounters in which he would violate the Act, when the fetal head becomes lodged in the cervical os during a D & E, he believes it is safer to administer Terbutaline or nitroglycerine to the patient to facilitate additional dilation, rather than compress the skull. (Giles Decl. ¶ 6 (Pls' App. Tab 14); *see also* Giles Dep. at 61.) Dr. Giles, however, has no relevant experience to offer that opinion. Dr. Giles testified that he can recall no occasion on which he has used medication – including Terbutaline, nitroglycerine, fluothane or halothane – to achieve cervical dilation during a D & E, nor even any occasion at all during the performance of a D & E when the fetal head became lodged. (Giles Dep. at 82:2-7, 83:10-84:7; *see also id.* at 62:8-63:524 (quoting prior testimony).)

56. Moreover, there is no medical support for Dr. Giles' "alternative medication method" for completing a D & E when the fetal head is lodged in the cervix as a safe alternative beyond Dr. Giles' statement, which is unsupported by citation. (Giles Decl. ¶ 6; *see also* Giles Dep. at 8:16-21; 72:25-73:14.) Such steps are not cited in accepted medical literature, *see* Warren Hern, M.D., M.P.H., Ph.D.,

Abortion Practice, (1990), Maureen Paul, M.D., M.P.H., et al., *A Clinician's Guide to Medical and Surgical Abortion*, (1999), and Dr. Giles admits as much. (Giles Dep. at 74:2-9.) Dr. Giles further admits that no studies have ever been done regarding the use of Terbutaline, nitroglycerine, fluothane, or halothane in second-trimester D & E's. (Giles Dep. at 8:16-21; 72:25-73:14; *see also* Dep. of Dr. Fitzhugh dated July 29, 1998, in *Richmond Med. Ctr. v. Gilmore* at 143:18-145:18 (Pls' App. Tab 15).) Nor can Dr. Giles name any physician who has used such medication to complete a D & E where the fetal head was lodged in the woman's cervix. (Giles Dep. at 75:6-76:3.)

57. Furthermore, evidence, including testimony by defendants' own expert, Dr. Seeds, indicates that the administration of those medications would be completely ineffective in aiding cervical dilation. (Christmas Decl. ¶¶ 10-11; Seeds Dep. at 97:4-25; deProsse Dep. at 69:9-70:12.) Additionally, administration of those medications presents its own risks (Christmas Decl. ¶ 11), and they would be contraindicated in some patients. (*Id.*; Seeds Dep. at 99:7-100:4.)

58. In addition, Dr. Giles' testimony is not credible for several reasons. First, his experience with D & E's is minimal: Dr. Giles has performed only one D & E abortion since 1998 (Giles Dep. at 24:5-25:6, 25:24-26:10); in the years before 1998, since the middle of the 1980s, Dr. Giles performed at most four D & E's per year (*id.* at 26:14-28:5); 85-90% of the second-trimester abortions Dr. Giles performs are inductions (*id.* at 27:5-12); and D & E's have always constituted a small percentage of the second-trimester procedures he performs. (Trial Testimony of Harlan Raymond Giles, M.D., dated Aug. 19, 1998, in *Richmond Med. Ctr. v. Gilmore* ("Giles Trial Test. (*Gilmore*)"), at

332:3-6 (Pls' App. Tab 16).) Additionally, Dr. Giles admits that he does not regularly review medical literature on abortion. (Giles Dep. at 111:11-15.) Finally, methods Dr. Giles advocates for completing D & E's, such as waiting for a few hours for a lodged fetal head to expel on its own, even if a partially dismembered fetus is positioned inside the woman, (Giles Dep. at 65:17-66:17), fall below the accepted standard of care. (Christmas Decl. ¶ 9.)

59. Second, and more significant, Dr. Giles' sworn testimony is unreliable because it is inconsistent and incoherent. *Compare* Giles Dep. (*Doyle*) at 110:4-22 (testifying that forceps would be his first choice in order to facilitate the removal of a lodged fetal skull of a pre-viable fetus during a D & E) *with* Giles Dep. at 61:12-63:5 (stating that compression of the fetal skull using forceps is a "last resort," yet acknowledging that prior conflicting testimony in *Doyle* was given under oath). His testimony regarding his use of his "medication" alternative during D & E's is even more incoherent. *Compare* Giles Dep. at 82:2-7, 83:10-84:7, 62:8-63:5 (recalling no occasion on which he has used medication to achieve cervical dilation during a D & E) *with* Giles Trial Test. (*Gilmore*) at 416:13-15 (testifying that he has used his medication alternative during D & E's on a number of occasions); *compare* Dep. of Harlan Giles, May 2, 1997, in *Evans v. Kelley* ("Giles Dep. (*Evans*)") at 24:12-16 (testifying that he would not do a D & E procedure at a fetal gestational age later than 20 weeks) (Pls' App. Tab 17) *with* Trial Test of Harlan Giles, dated May 27, 1999, in *Planned Parenthood v. Doyle* at 239:3-6 (testifying that he has never used cervical relaxants during a D & E procedure prior to 24 weeks gestation) (Pls' App. Tab 18) *with* Giles Dep. at 67:14-68:21 (testifying that he has used cervical relaxants

during D & E's only *up to* 20 weeks gestation). Not surprisingly, Dr. Giles has testified that "[a]ny doctor could offer an opinion that something is safer or less safe," and includes himself in that category. (Giles Trial Test (*Gilmore*) at 389:3-4; Giles Dep. at 114:11-17.)

60. Similarly, in sworn testimony, Dr. Giles' estimates of the total number of abortions he has performed has varied wildly, from around 1,000 to 12,000 or even more. *See* Giles Dep. at 37:9-47:5. Likewise, his estimates of the total number of D & E's he has performed over his career, using various figures and percentages that he has testified to over time, range from approximately 38 to 1,000. *See id.*

61. Dr. Giles' lack of credibility is not limited to this case. This Court and numerous others have previously discredited Dr. Giles as an expert in abortion methods and the practice of medicine. *See, e.g., Richmond Med. Ctr.*, 55 F.Supp.2d at 450-51 (finding Dr. Giles more focused on the political aspects of the abortion debate than on the medical questions essential to resolution of issues in case); *Oliveira v. Jacobson*, No. Civ. A. PC 99-675, 2002 WL 1288783, at (R.I.Super. May 22, 2002) (noting that Dr. Giles' credibility was "shredded" as omissions and misrepresentations on his curriculum vitae and "misstatements" in past depositions were exposed); *Evans v. Kelley*, 977 F.Supp. 1283, 1309-10 (E.D.Mich.1997) (noting that Dr. Giles testified about meaning of Michigan statute without being familiar with its language); *Women's Med. Prof'l Corp. v. Voinovich*, 911 F.Supp. 1051, 1070 (S.D.Ohio 1995) (finding Dr. Giles' criticisms of the D & X procedure unpersuasive), *aff'd*, 130 F.3d 187 (6th Cir.1997); *see also* 8/22/03 Order, FF ¶ 37.

62. Dr. Seeds, defendants' only other expert, admits that he is not an expert on D & E's, nor an expert on abortions. (Seeds Dep. at 48:16-49:12.) Dr. Seeds has not performed a single D & E abortion over the course of his 30-year career, (*id.* at 32:5-9), nor does he observe his colleagues at MCV perform the procedure (*id.* at 44:18-20). During his entire career, Dr. Seeds has observed only three or four D & E's, and those were over 12 years ago. (*Id.* at 45:7-14.)

II. LEGAL STANDARD

When "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law," summary judgment must be granted pursuant to Rule 56 of the Federal Rules of Civil Procedure. Fed.R.Civ.P. 56(c); *see also Bouchat v. Baltimore Ravens Football Club, Inc.*, 346 F.3d 514, 519 (4th Cir.2003); *Allstate Financial Corp. v. Financorp, Inc.*, 934 F.2d 55, 58 (4th Cir.1991). Once the moving party discharges its burden by showing that there is an absence of genuine issue as to any material fact, the burden shifts to the nonmoving party to produce sufficient evidence demonstrating that there is a genuine issue for trial. *Kitchen v. Upshaw*, 286 F.3d 179, 182 (4th Cir.2002) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)). "By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Material facts are only those facts that might affect

the outcome of the action under governing law. *Id.* at 248, 106 S.Ct. 2505. They must be significantly probative, not merely colorable, and must be sufficient for a jury to return a verdict for the nonmoving party. A mere scintilla of evidence supporting the case is insufficient. *See, e.g., Anderson*, 477 U.S. at 249-50, 106 S.Ct. 2505; *Shaw v. Stroud*, 13 F.3d 791, 798 (4th Cir.1994).

III. DISCUSSION

A. Motions to Strike

The Court has found Dr. Giles' testimony to be unsupported, not credible, and unreliable. *See supra*, FF ¶¶ 55-61. Based on *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999) and *Daubert v. Merrell Dow*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), Dr. Giles' opinions are unreliable and therefore inadmissible. Even more significant, however, is the Court's finding that Dr. Giles' testimony is inconsistent and incoherent. Given this inconsistency, the Court will grant plaintiffs' motion to strike Dr. Giles' testimony as a whole.

The Court has found Dr. Seeds not to be an expert on abortions nor on D & E's. *See supra*, FF ¶ 62. Based on *Kumho Tire* and *Daubert*, Dr. Seeds' opinions challenged by the plaintiffs are unreliable and inadmissible. Accordingly, the Court will grant plaintiffs' motion to strike selected portions of Dr. Seeds' sworn testimony.

The Court also finds the documents challenged by plaintiffs to be irrelevant hearsay and inadmissible. The list of seven medical abstracts and article titles, defendants' Exhibit J, is hearsay not covered by any exception, which is therefore inadmissible. The list is also irrelevant.

The four documents related to H.R. 760, which was a bill in the United States Congress later passed by both houses with slightly altered text (Exhibits L, M, N, and O), are also irrelevant and contain hearsay not covered by an exception. These documents may not be admitted under Federal Rule of Evidence 803(8)(c). Each of the exhibits lacks an indicia of trustworthiness. Courts have consistently excluded congressional reports, finding that they did not satisfy the requirements of Rule 803(8)(c) because of the inherently political nature of the reports. *See, e.g., Anderson v. City of New York*, 657 F.Supp. 1571, 1579 (S.D.N.Y.1987) (excluding a congressional report because it lacked the "ordinary indicia of reliability"); *Baker v. Firestone Tire & Rubber Co.*, 793 F.2d 1196, 1199 (11th Cir.1986) (finding congressional report lacked trustworthiness and was thus inadmissible because it was politically motivated); *Bright v. Firestone Tire & Rubber Co.*, 756 F.2d 19 (6th Cir.1984) (per curiam). The House Report (Exhibit L) represents the political position of the representatives who voted for it. It is untrustworthy and inadmissible. Defendants also submitted the first 26 pages of House Report 108-58 (Exhibit M), a 154-page report. It is also political, untrustworthy, and inadmissible. Exhibit N, the statement of Dr. Mark G. Neerhof before the House of Representatives, is also irrelevant and constitutes inadmissible hearsay. It is not even a public record or report. Dr. Neerhof is a non-expert making a statement regarding a piece of federal legislation. Exhibit O, the statement of Law Professor Gerard V. Bradley, is inadmissible hearsay. It also impermissibly asserts legal conclusions. Exhibit P, the AMA Statement, and the newspaper articles cited in footnote 7 of defendants' brief are all inadmissible hearsay as well. For these reasons, the plaintiffs' motion to strike exhibits and other documents will be granted.

B. Motion for Summary Judgment

1. The Constitutional Right to Privacy

The plaintiffs argue that the Act contains the same flaws that led the Supreme Court to invalidate the Nebraska statute in *Carhart*. In *Carhart*, the Supreme Court held that Nebraska's ban on "partial birth abortion" was unconstitutional on its face because it endangered, rather than promoted, women's health. 530 U.S. at 930, 938, 946, 120 S.Ct. 2597. Specifically, the Supreme Court held the Nebraska statute banning partial birth abortions unconstitutional for two reasons: (1) because it caused "[a]ll those who perform abortion procedures using [the D & E] method [to] fear prosecution, conviction and imprisonment," placing "an undue burden upon a woman's right to make an abortion decision," *Carhart*, 530 U.S. at 945-46, 120 S.Ct. 2597; and, (2) because it failed to contain a health exception even though substantial medical authority supported the proposition that banning intact D & E's would endanger women's health. *Id.* at 936-37, 120 S.Ct. 2597. The Court agrees with the plaintiffs and finds the Act unconstitutional on its face for precisely the same reasons.[1]

First, the Act is unconstitutional because it fails to contain a health exception. Pursuant to *Carhart*, the Act

[1] Pursuant to *Carhart*, the Court rejects the defendants' argument that the Court should apply the "no set of circumstances" test from *United States v. Salerno*, 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). *Carhart* did not apply the *Salerno* analysis or even the framework from *Planned Parenthood v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) in facially striking down the Nebraska statute. *See Carhart* at 922, 120 S.Ct. 2597; *id.* at 1019, 120 S.Ct. 2597 (Thomas, J., dissenting). The plaintiffs have met their burden for a facial challenge.

must contain a health exception. The Supreme Court stated:

> [T]he governing standard requires an exception 'where it is necessary, in appropriate medical judgment for the preservation of the life or health of the mother,' *Casey*, *supra* at 879[, 112 S.Ct. 2791], for this Court has made clear that a State may promote but not endanger a woman's health when it regulates the methods of abortion.

Carhart, 530 U.S. at 931[, 120 S.Ct. 2597] (citations omitted). The Court emphasized that it is impermissible for a state to subject women's health to significant risks by forcing women, through regulation, to use riskier *methods* of abortion. *Id.* ("Our cases have repeatedly invalidated statutes that in the process of regulating the methods of abortion, imposed significant health risks."). Thus, the Court held that "where substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women's health, *Casey* requires the statute to include a health exception when the procedure is necessary, in appropriate medical judgment for the preservation of the life or health of the mother." *Id.* at 938, 120 S.Ct. 2597 (internal citations and quotations omitted).

The Court held that even if the Nebraska statute could have been interpreted to ban *only* the intact D & E method of abortion performed by the plaintiff in that case, it would still have been unconstitutional. *Id.* at 937, 120 S.Ct. 2597. The burden was on the State of Nebraska to demonstrate that banning intact D & E's "without a health exception may not create significant health risks for women." *Id.* at 932, 120 S.Ct. 2597, *see also id.* at 928-29, 120 S.Ct. 2597 (noting that intact D & E's and D & X's are

sufficiently similar so that the terms can be used interchangeably). The Court held that Nebraska did not meet that burden because "[w]here a significant body of medical opinion believes a procedure may bring with it greater safety for some patients and explains the medical reasons supporting that view, we cannot say that the presence of a different view by itself proves the contrary." *Id.* at 937-38, 120 S.Ct. 2597. Further, in the previous Virginia case, Judge Luttig, writing for the United States Court of Appeals for the Fourth Circuit and addressing the *Carhart* decision, stated, "The Court has [ ] unequivocally held that any ban on partial-birth abortion must include an exception for the health of the mother in order to be constitutional." *Richmond Med. Ctr., for Women v. Gilmore*, 219 F.3d 376, 377 (4th Cir.2000). The Tenth Circuit has also interpreted *Carhart* to require a health exception. *Planned Parenthood v. Owens*, 287 F.3d 910, 917-18 (10th Cir.2002) ("*Stenberg* also confirmed that the lack of a health exception is a sufficient ground for invalidating a state abortion statute.").

There is substantial medical authority, including testimony from defendants' experts, that supports the proposition that banning D & E's, and the manner in which Dr. Fitzhugh performs D & E's, including intact D & E's, could endanger women's health. Through testimony and declaration, Dr. Fitzhugh and Dr. deProsse have stated that the manner in which Dr. Fitzhugh performs D & E' s that are prohibited by the Act is both the safest and most medically appropriate for some of his patients and have relied on their experience and additional medical authority in forming those opinions. (Fitzhugh Decl. ¶¶ 19-20, 22-24, 33; deProsse Decl. ¶¶ 22-26, 41, 44-46, 50-55; deProsse Dep. at 82:6-83:13; *see also* Christmas Decl. ¶ 8;)

8/22/03 Order, FF ¶ 32; *Carhart*, 530 U.S. at 936-37, 120 S.Ct. 2597 (concluding that substantial medical authority, including statements from the American College of Obstetricians and Gynecologists, supports proposition that banning intact D & E's would endanger women's health such that Constitution requires a ban on such procedures to contain a health exception); *Richmond Med. Ctr.*, 55 F.Supp.2d at 453-54, 490. Dr. Giles, defendants' own expert, does not disagree. Dr. Giles testified that the manner in which Dr. Fitzhugh completes D & E's is medically acceptable and that criminalizing the way Dr. Fitzhugh performs them could endanger women's health. (Giles Dep. at 84:9-85:6, 85:24-86:5, 92:21-93:20, 128:15-129:6; Fitzhugh Decl. ¶ 23;) *see also supra*, FF ¶¶ 33 & 34. Therefore, the Act is unconstitutional because it does not contain a health exception.

Also, even if the Act criminalized only intact D & E's – which the defendants concede are banned by the Act – the record is clear that intact D & E's have many safety advantages over D & E's involving dismemberment. *See* 8/22/03 Order, FF ¶¶ 31, 32. The defendants cannot meet the burden for upholding the Act despite its lack of a health exception – that is, by proving that a health exception is *never* necessary to preserve the health of women. *Carhart*, 530 U.S. at 937-38, 120 S.Ct. 2597; *supra*, FF ¶ 35. Even if the defendants could present credible evidence disagreeing with the evidence in this case, such opinions would not meet defendant's burden. As the Supreme Court explained in *Carhart*:

> Where a significant body of medical opinion believes a procedure may bring with it greater safety for some patients and explains the medical reasons supporting that view, we cannot say that

> the presence of a different view by itself proves the contrary. Rather, the uncertainty means a significant likelihood that those who believe that D & X is a safer abortion method in certain circumstances may turn out to be right. If so, then the absence of a health exception will place women at an unnecessary risk of tragic health consequences.

530 U.S. at 938, 120 S.Ct. 2597.

Further, the Court is not persuaded by the argument that the instances in which Dr. Fitzhugh would actually violate the Act are rare and that therefore a health exception is not required. As the Supreme Court stated in *Carhart*, the argument of "relative rarity . . . is not highly relevant." *Id.* at 934, 120 S.Ct. 2597. "[T]he state cannot prohibit a person from obtaining treatment simply by pointing out that most people do not need it." *Id.* In addition, the Court rejects the argument that the "life exception" saves the Act. The Act must include an exception for both the woman's life and health. *See Carhart*, 530 U.S. at 921, 936-37, 120 S.Ct. 2597.

The Court also rejects any argument that the Act could be read to contain a health exception. There are two applicable rules of statutory construction. First, "*expressio unis est exclusio alterius*," which "instructs that where a law expressly describes a particular situation to which it shall apply, what was omitted or excluded was intended to be omitted or excluded." *See Reyes-Gaona v. North Carolina Growers Ass'n, Inc.*, 250 F.3d 861, 865 (4th Cir.2001). Second, since there is no ambiguity in the language of the Act, the Court's "analysis must end with the statute's plain language." *See Hillman v. I.R.S.*, 263 F.3d 338, 342 (4th Cir.2001). Thus, under applicable rules of statutory

construction and based on the records of the Virginia General Assembly, which show that the General Assembly rejected amendments that would have provided an exception for some circumstances when the woman's health was at risk, it is cleat [sic] that the General Assembly intentionally omitted an exception for the woman's health. *See supra*, FF ¶¶ 7-11. Accordingly, since the Act must include an exception for both the woman's life and the woman's health and since it does not, it is unconstitutional on its face.

Second, the Act also places an undue burden on women's constitutional right to choose an abortion. The plain language of the Act bans pre-viability D & E's and would cause those who perform such D & E's to fear prosecution, conviction and imprisonment. The Act, like the Nebraska statute at issue in *Carhart* and like Virginia's previous attempt at a "partial birth" ban, ignores the Supreme Court's "established [] line of demarcation for a State's ability to regulate and proscribe abortion in terms of whether the fetus was viable or nonviable," and instead tries to establish a line in "terms of whether a fetus was in the process of being born." *See Richmond Med. Ctr.*, 55 F.Supp.2d at 480. As the Supreme Court stated in *Carhart*, by imposing "'an undue burden on a woman's ability' to choose a D & E abortion," the statute unduly burdened "the right to choose abortion itself." 530 U.S. at 930, 120 S.Ct. 2597 (quoting *Casey*, 505 U.S. at 874, 112 S.Ct. 2791). Like the Nebraska statute, the Act also places an undue burden on a woman's ability to choose a D & E abortion and therefore unduly burdens "the right to choose abortion itself." Based on the Court's findings of fact, *see supra*, FF ¶¶ 1-3, 4, 7, 46-54, and on the law as set forth in *Carhart*, the Act imposes an impermissible undue

burden on the constitutional right to choose an abortion. *See Carhart*, 530 U.S. at 945-46, 120 S.Ct. 2597.

Further, the Act's "life exception" is also constitutionally inadequate. Subsection E, the Act's life exception, impermissibly requires physicians to prioritize the "health and life" of a pre-viable fetus ahead of the well-being of a woman seeking an abortion. *See supra*, FF ¶ 7. Subsection E's life exception applies only for a "procedure that, in reasonable medical judgment, is *necessary* to prevent the death of the mother." Thus, the exception is limited to situations in which the abortion procedure that violated the Act is the *only* procedure that would have saved the woman's life, and it would not apply if a more dangerous abortion procedure – induction, hysterectomy, or hysterotomy – could have been performed and prevented the death of the woman. *See supra*, FF ¶¶ 40-42, 45. Therefore, the "life exception" forces women to undergo riskier abortion procedures, even when the abortion is necessary to safe her life. Under *Carhart*, "a State may promote but not endanger a woman's health when it regulates the methods of abortion." 530 U.S. at 931, 120 S.Ct. 2597. Subsection E also requires the physician to take "every medically reasonable step, consistent with such procedure, to preserve the life and health of the infant," in order to be exempt from prosecution. By doing so, the Act, like the previous Virginia statute, "constitutes an impermissible 'trade-off' between women's health and fetal survival." *Richmond Med. Ctr.*, 55 F.Supp.2d at 485. "It is settled that, when state legislation demands such a 'trade-off' before fetal viability, it places a 'substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.'" *Id.* Accordingly, the "life exception" also renders the Act unconstitutional.

Finally, the Act also bans safe gynecological procedures in addition to abortion without a compelling interest. The Due Process Clause protects a person's right to choose the type of medical care she receives. Therefore, any infringement by the government upon that right is subject to strict scrutiny and will be upheld only if the infringement is narrowly tailored to further a compelling interest. *See Carey v. Population Serv. Int'l*, 431 U.S. 678, 684-686, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977). The Act could be interpreted to subject Dr. Fitzhugh to prosecution for completing a miscarriage in a safe and medically appropriate manner for a woman who presents in his office mid-miscarriage. *See supra*, FF ¶ 47. Thus, the Act infringes on women's constitutionally protected rights to preserve their bodily integrity and to choose the type of medical care that they receive. Virginia has no compelling interest. Accordingly, this also renders the Act unconstitutional.

2. Vagueness

Plaintiffs also argue that the Act is void for vagueness, in violation of the Due Process Clause, because its failure to clearly define the prohibited medical procedures deprives physicians of fair notice. *See, e.g., Carhart v. Stenberg*, 11 F.Supp.2d 1099, 1132 (D.Neb.1998) (explaining that "[a] criminal law, especially one banning protected constitutional freedoms like abortion, that fails to give fair warning or that allows arbitrary prosecution is 'void for vagueness'"), *aff'd*, 192 F.3d 1142 (8th Cir.1999), *aff'd*, 530 U.S. 914, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000). Judge Payne addressed this issue with regard to the previous Virginia statute, noting that "law enforcement officials and prosecutors, who – unlike the Plaintiffs,

generally are not trained in obstetrics – likewise are left adrift when it comes to ascertaining the Act's reach." *Richmond Med. Ctr.*, 55 F.Supp.2d at 494 n. 63. The Court agrees with the plaintiffs and finds the Act impermissibly void for vagueness.

A law is void for vagueness where persons "of common intelligence must necessarily guess at its meaning and differ as to its application." *Smith v. Goguen*, 415 U.S. 566, 573 n. 8, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974) (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926)); *South Carolina Med. Ass'n v. Thompson*, 327 F.3d 346, 354 (4th Cir.2003). Vague statutes offend several basic principles of due process. An individual must have adequate notice as to what conduct is prohibited, so that he or she may act accordingly. *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). Where the prohibited conduct is vaguely defined, the statute threatens to "trap the innocent by not providing fair warning." *Id.* Vague statutes also invite uneven or discriminatory law enforcement and conviction because they fail to provide clear standards to law enforcement officials. *Id.* at 108-09, 92 S.Ct. 2294. Where "a statute imposes criminal penalties, the standard of certainty is higher." *Kolender v. Lawson*, 461 U.S. 352, 358 n. 8, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983); *see also Garner v. White*, 726 F.2d 1274, 1278 (8th Cir.1984) (emphasizing that "[g]reater specificity is required of laws imposing criminal penalties and those infringing on constitutionally protected rights"). Failure to satisfy this especially stringent standard necessitates that the law be held vague on its face "even when [the law] could conceivably have had some valid application." *Kolender*, 461 U.S. at 358 n. 8, 103 S.Ct. 1855. Where a statute reaches a

"substantial amount of constitutionally protected conduct," it need not be vague in all its applications. *Id.* (citing *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982)).

Several of the terms in the Act are especially ambiguous: "from its mother," "from the body of the mother," "outside the body of the mother," and "involving dismemberment of the fetus prior to removal from the body of the mother." The "life exception," Subsection E, is so confusing as to be meaningless. The requirement of taking steps to preserve the fetus makes no sense since the exception applies only when a physician both intends to and does "kill the fetus."

The Act does not meet the high degree of clarity required where "the uncertainty induced by the statute threatens to inhibit the exercise of constitutional rights." *Richmond Med. Ctr.*, 55 F.Supp.2d at 494 (quoting *Colautti v. Franklin*, 439 U.S. 379, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979)). For these reasons, the Court finds the Act invalid on its face because it is impermissibly void for vagueness.

IV. CONCLUSION

Having considered the pleadings, the exhibits, and the arguments of counsel, the Court concludes that no genuine issue of material fact exists and that plaintiffs are entitled to judgment as a matter of law. The Court further concludes as a matter of law that the Act is unconstitutional on its face. It violates the constitutional right to privacy, it impermissibly infringes on the fundamental right to choose an abortion because it imposes an undue burden on that right and because it contains no health exception and

an inadequate life exception, and it is impermissibly void for vagueness. Having found the Act to be unconstitutional on its face, the Court will grant plaintiffs' motion for summary judgment, will grant plaintiffs' request for declaratory relief, and will permanently enjoin the Act in its entirety.

An appropriate Order shall issue.

FINAL ORDER

This matter is before the Court on the plaintiffs' motion for summary judgment. Also pending are plaintiffs' motions to strike (1) selected portions of Dr. Giles' sworn testimony; (2) selected portions of Dr. Seeds' sworn testimony; and (3) exhibits and other documents.

Having considered the pleadings, the exhibits, and the arguments of counsel, the Court concludes that no genuine issue of material fact exists and that plaintiffs are entitled to judgment as a matter of law. The Court further concludes as a matter of law that the Act is unconstitutional on its face. It violates the constitutional right to privacy, it impermissibly infringes on the fundamental right to choose an abortion because it imposes an undue burden on that right and because it contains no health exception and an inadequate life exception, and it is impermissibly void for vagueness. Accordingly, the plaintiffs' motion for summary judgment is GRANTED, their request for declaratory relief is GRANTED, and their request for permanent injunctive relief is GRANTED. The Act, Va.Code Ann. § 18.2-71.1, is DECLARED unconstitutional on its face. The defendants, and their employees, agents, and successors, are PERMANENTLY ENJOINED from enforcing Va.Code Ann. § 18.2-71.1.

The Court also GRANTS plaintiffs' motions to strike (1) Dr. Giles' sworn testimony, which is stricken as a whole; (2) selected portions of Dr. Seeds' sworn testimony; and (3) certain exhibits and other documents.

It is so ORDERED.

Let the Clerk SEND a copy of this Final Order and the accompanying Memorandum Opinion to all counsel of record.

PUBLISHED

Filed: September 2, 2005

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 03-1821

RICHMOND MEDICAL CENTER FOR WOMEN; WILLIAM G. FITZHUGH, M.D., on behalf of themselves, their staffs, and their patients,

Plaintiffs-Appellees,

versus

DAVID M. HICKS, in his official capacity as Commonwealth Attorney for the City of Richmond; WADE A. KIZER, in his official capacity as Commonwealth Attorney for the County of Henrico,

Defendants-Appellants.

HORATIO R. STORER FOUNDATION, INCORPORATED,

Amicus Supporting Appellants,

PHYSICIANS FOR REPRODUCTIVE CHOICE AND HEALTH; VANESSA E. CULLINS, Vice President for Medical Affairs, Planned Parenthood Federation of America; FORTY-TWO INDIVIDUAL PHYSICIANS,

Amici Supporting Appellees.

No. 04-1255

RICHMOND MEDICAL CENTER FOR WOMEN; WILLIAM G. FITZHUGH, M.D., on behalf of themselves, their staffs, and their patients,

Plaintiffs-Appellees,

versus

DAVID M. HICKS, in his official capacity as Commonwealth Attorney for the City of Richmond; WADE A. KIZER, in his official capacity as Commonwealth Attorney for the County of Henrico,

Defendants-Appellants.

HORATIO R. STORER FOUNDATION, INCORPORATED,

Amicus Supporting Appellants,

PHYSICIANS FOR REPRODUCTIVE CHOICE AND HEALTH; VANESSA E. CULLINS, Vice President for Medical Affairs, Planned Parenthood Federation of America; FORTY-TWO INDIVIDUAL PHYSICIANS,

Amici Supporting Appellees.

ORDER

I.

Upon a request for a poll of the court on the petition for rehearing en banc, Judges Widener, Niemeyer, and Shedd voted to grant the petition for rehearing en banc. Chief Judge Wilkins, Judges Wilkinson, Luttig, Michael, Motz, Traxler, King, Gregory, and Duncan voted to deny rehearing en banc. Accordingly, the petition for rehearing en banc is denied.

II.

The panel considered the petition for rehearing. Judge Niemeyer voted to grant the petition for rehearing, and Judges Michael and Motz voted to deny the petition for rehearing. Accordingly, the petition for rehearing is denied.

III.

Judge Wilkinson, Judge Luttig, and Judge Michael filed separate opinions concurring in the denial of rehearing en banc. Judge Niemeyer filed a separate opinion dissenting from the denial of rehearing en banc, in which Judge Widener joined. The separate opinions are attached.

IV.

Judge Williams, being disqualified, did not participate in the proceedings with respect to this case.

For the Court,

/s/ Patricia S. Connor
Clerk

WILKINSON, Circuit Judge, concurring in the denial of rehearing en banc:

Whatever one's views on the various issues surrounding abortion, ending the life of an infant at the moment of its birth is a uniquely disturbing act.

At the very least, the democratic process should not be precluded from coming to that judgment. We have always relied upon that process to soften the harsh blows of life. The New Deal and Great Society had in common a desire to help those who through no fault of their own found themselves in straitened circumstances. If our democracy can work to enhance equal opportunity in life, should it not also be permitted here to enhance the opportunity for life to begin? I am at a loss to explain how a partially born child can be excluded from the American embrace.

Whether a health exception to a partial birth abortion ban is a necessity or a loophole – and the proper scope of such exceptions – strike me as altogether fair and debatable questions, but again, I believe the political process deserves some leeway in arriving at the answers. Our democracy often cools passions by giving them appropriate expression. The partial birth abortion debate will, I fear, be only further inflamed through judicially imposed solutions.

The moment a child is brought into the world is supposed to represent the ultimate in human joy. Instead, through methods of partial birth abortion too gruesome to bear repetition here, medical science is employed to bring a child's life to an end. That a right to the "intact D&E/D&X procedure" is now found in no less than our founding document is simply and indescribably sad. The

means that so transform the miracle of birth are not something this good land should seek to constitutionalize.

* * *

We do not write upon a clean slate here. As circuit judges, we are bound to follow the Supreme Court. I can find no fair basis for distinguishing this case from *Stenberg v. Carhart,* 530 U.S. 914 (2000). For that reason, I vote to deny rehearing en banc.

LUTTIG, Circuit Judge, concurring in the denial of rehearing en banc:

I vote to deny rehearing en banc in this case for the reasons stated in my concurrence in *Richmond Medical Center for Women v. Gilmore,* 219 F.3d 376 (4th Cir. 2000).

MICHAEL, Circuit Judge, concurring in the denial of rehearing en banc:

I concur in the court's denial of rehearing en banc. The panel decision, *Richmond Medical Center for Women v. Hicks,* ___ F.3d ___ (2005), holds that the Commonwealth of Virginia's latest statute criminalizing "partial birth abortion" is unconstitutional on its face because it lacks an exception to protect a woman's health. The decision is mandated by *Stenberg v. Carhart,* 530 U.S. 914 (2000), which holds that any statute banning "partial birth abortion," specifically the intact D&E/D&X procedure, must contain a health exception in order to be constitutional.

In *Carhart* the Supreme Court, in striking down a Nebraska ban on "partial birth abortion," based its holding on longstanding precedent and a thoroughgoing analysis of all available medical information. The Court began by

recognizing the established standard from *Roe v. Wade*, 410 U.S. 113, 164-65 (1973), a standard reiterated by the plurality opinion in *Planned Parenthood v. Casey*, 505 U.S. 833, 879 (1992): "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion *except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.*" *Carhart*, 530 U.S. at 930 (internal quotation marks and citation omitted). The *Carhart* Court applied this standard by examining medical opinion and information regarding the intact D&E/D&X procedure from a broad range of sources. The Court drew both from the record and sources outside the record, including medical textbooks and journals covering abortion, the factual records developed in other "partial birth abortion" cases, and amicus briefs (with citations to medical authority) submitted by medical organizations. Based on all of this information, the Court determined that substantial medical authority supports the proposition that the intact D&E/D&X procedure offers significant health and safety advantages in certain circumstances. *See id.* at 934-38. This determination led the *Carhart* Court to establish as a *per se* constitutional rule the health exception requirement for any statute outlawing "partial birth abortion." *Id.* at 938 (holding that "a statute that altogether forbids [the intact D&E/]D&X" procedure necessarily "creates a significant health risk" and "consequently must contain a health exception"). As Virginia acknowledges, its statute criminalizes "the D&X procedure, or what is sometimes referred to as an 'intact D&E.'" Reply Br. of Appellants at 2; *see also id.* at 3 (identifying "[t]he central issue in this case" as "whether [Virginia] may prevent use of the D&X or intact D&E" procedure). Because the Virginia statute

lacks a health exception, it is unconstitutional on its face. *See Carhart,* 530 U.S. at 938; *see also Sabri v. United States,* 124 S. Ct. 1941, 1948-49 (2004) (recognizing the validity of facial challenges to statutes regulating abortion procedures).

NIEMEYER, Circuit Judge, dissenting from the denial of Virginia's petition to rehear this case *en banc*:

In the aftermath of the Supreme Court's decision in *Stenberg v. Carhart,* 530 U.S. 914 (2000) (holding unconstitutionally overbroad a Nebraska partial-birth abortion statute), Virginia enacted a narrowly focused law in 2003, making it a criminal offense "to kill a human infant who has been born alive, but who has not been completely extracted or expelled from its mother." Va. Code Ann. § 18.2-71.1(B). The statute explicitly excludes numerous abortion methods from its coverage and applies *only* to protect a live fetus that has been delivered halfway into the world – i.e., either "the infant's entire head is outside the body of the mother" or, for a breech delivery, "any part of the infant's trunk past the navel is outside the body of the mother." *Id.* § 18.2-71.1(D). Virginia found it unnecessary, based on the narrow proscriptions of its statute, to include an exception for the health of the mother because the available medical data revealed that protecting a live fetus that is delivered at least halfway from its mother does not put the mother's health at risk.

Without analysis of the statute's application to the facts in the record, the panel majority struck down Virginia's statute as unconstitutional under *Carhart.* Rather than analyze the statute's reach and the record, the majority held simply that *Carhart* created a *per se constitutional rule* that any partial-birth abortion statute must

contain a health exception regardless of whether the facts relevant to the statute's prohibition demonstrate a need for one. *See Richmond Med. Ctr. for Women v. Hicks*, 409 F.3d 619, 624-26 (4th Cir. 2005).

In addition, in striking down Virginia's statute on a facial challenge, the majority disregarded the standard for reviewing facial challenges defined in *United States v. Salerno*, 481 U.S. 739, 745 (1987), and ignored this circuit's standard for facial challenges of abortion laws, *see Greenville Women's Clinic v. Comm'r*, 317 F.3d 357, 362 (4th Cir. 2002); *Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 163-65 (4th Cir. 2000); *Manning v. Hunt*, 119 F.3d 254, 268-69 (4th Cir. 1997).

These two issues – (1) whether *Carhart* creates a *per se* constitutional rule and (2) whether facial challenges to abortion statues are governed by *United States v. Salerno* – are questions of exceptional importance to the people of Virginia and to our jurisprudence and so qualify this case for *en banc* review. *See* Fed. R. App. P. 35(a)(2). I therefore take exception to our decision not to rehear this case *en banc*.

Our court's continuing rejection of Virginia's multiple efforts to legislate for the protection of fetuses, *see Richmond Med. Ctr. for Women v. Gilmore*, 224 F.3d 337 (4th Cir. 2000); *Richmond Med. Ctr. for Women v. Hicks*, 409 F.3d 619 (4th Cir. 2005), has created an unnecessary tension between federal law and state sovereign authority. As I demonstrated in my separate opinion, dissenting from the majority, *see Richmond Med. Ctr. for Women v. Hicks*, 409 F.3d at 630-34 (Niemeyer, J., dissenting), the Virginia statute before us now, when analyzed against the record in this case, does not conflict with the U.S. Constitution as

interpreted in *Carhart*. The *Carhart* holding relates to a totally different statutory proscription in the context of a totally different factual record.

The statute at issue in *Carhart* provided that "'[n]o partial birth abortion shall be performed in this state,'" except "'to save the life of the mother.'" *Carhart*, 530 U.S. at 921 (quoting Neb. Rev. Stat. § 28-328(1)). The Supreme Court read the Nebraska statute, which regulated only the *methods* of performing abortions, to prohibit a broad array of abortion procedures. The Court noted that the statute did not "directly further an interest 'in the potentiality of human life' by saving the fetus in question from destruction." *Id.* at 930. Unlike the Nebraska statute, the Virginia statute before us protects the fetus itself – the "human infant who has been born alive, but who has not been completely extracted or expelled from its mother," Va. Code Ann. § 18.2-71.1(B) – by prohibiting its destruction when it has been delivered at least halfway into the world. The Virginia statute also excepts from its coverage various abortion procedures prohibited by the Nebraska statute.

In addition, the record presented in *Carhart* was materially different from that before us. In *Carhart*, the Nebraska statute was found to prohibit a broad range of abortion procedures employed by doctors at various stages of fetal growth in various conditions, leaving the mother with no alternative when her health was at risk. The Supreme Court observed that the record demonstrated such risk to be "highly plausible." *Carhart*, 530 U.S. at 936. The Court accordingly concluded that "[g]iven these medically related evidentiary circumstances, we believe the law requires a health exception." *Id.* at 937.

No similar evidentiary circumstances can be found in the record here. The plaintiff presented no medical evidence to prove that the prohibition in Virginia's statute creates a risk to the mother's health. The Virginia statute protects the fetus in two limited scenarios: (1) when it is delivered headfirst into the vagina or beyond and (2) when it is delivered in breech position and the fetus is delivered halfway into the vagina. As to the first scenario, *no evidence* exists in the record to suggest that a prohibition against destroying the fetus creates any risk to the mother's health. As to the second scenario, all of Virginia's evidence and all of the written medical evidence indicate that preserving the fetus presents no risk to the mother's health. To the contrary, when a fetus is delivered in breech position, the medical evidence shows that the fetus can be safely delivered without deliberately destroying it. Dr. Fitzhugh did assert in testimony that if the fetal head becomes stuck – a rare occurrence even according to him – the *life* of the mother is placed at risk. But the Virginia statute provides a specific exception for such a circumstance. *See* Va. Code Ann. § 18.2-71.1(E) (permitting destruction of the fetus "to prevent the death of the mother").

In short, only by creating a *per se* constitutional rule *and* adopting a liberal standard for evaluating facial challenges of statutes was the majority able to strike down the Virginia statute. Neither action was required by established law. It is clear for all to read that we are doing *not* what is required by law, as I have amplified in my earlier opinion, *see* 409 F.3d at 645-46 (Niemeyer, J., dissenting), but what we will. And in doing so, we have unnecessarily extended the holding of *Carhart*.

I deeply regret that we do not find these issues sufficiently important to consider them as a court *en banc,* and I dissent from our refusal to do so.

Judge Widener has joined in this opinion.

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No. 05-730

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL HERRING, in his official capacity as Commonwealth's Attorney for the City of Richmond, and WADE A. KIZER, in his official capacity as Commonwealth's Attorney for the County of Henrico,

Petitioners,

— v. —

RICHMOND MEDICAL CENTER FOR WOMEN, and WILLIAM G. FITZHUGH, M.D., on behalf of themselves, their staffs, and their patients,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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INTRODUCTION

In *Stenberg v. Carhart*, 530 U.S. 914 (2000), this Court struck down a Nebraska statute banning so-called "partial-birth abortions" because it did not provide an exception for circumstances in which the procedure was necessary to protect the health of women seeking abortions. 530 U.S. at 937-38. At the core of the Court's decision was the principle that "where substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women's health, *Casey* requires the statute to include a health exception when the procedure is 'necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.'" *Id.* at 938 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 879 (1992)). This Court recently repeated this mantra, recognizing that "our precedents hold [] that a State may not restrict access to abortions that are 'necessary, in appropriate medical judgment, for preservation of the life or health of the mother.'" *Ayotte v. Planned Parenthood of N. New England*, 126 S. Ct. 961, 967 (2006) (citation omitted).

In direct defiance of this Court's decision in *Stenberg*, the Virginia Legislature enacted the statute at issue in this case. Like the Nebraska statute before it, the Act bans intact and non-intact D&Es and fails to include the health exception mandated in *Stenberg*. It was held unconstitutional by the trial and appellate courts in this case. *See Richmond Med. Ctr. for Women v. Hicks*, 409 F.3d 619 (4th Cir. 2005); *Richmond Med. Ctr. for Women v. Hicks*, 301 F. Supp. 2d 499 (E.D. Va. 2004).

Virginia petitioned this Court to review the decision of the Court of Appeals that the Commonwealth's statute banning abortion procedures is unconstitutional. The Petition proposes that the Court review two questions: (1) whether the Constitution requires a statute that prohibits "partial-birth abortion" to provide an exception for the health

of a pregnant woman; and (2) whether a federal court may allow a facial challenge alleging the overbreadth of such a statute. (Pet. 3.) Recognizing that the Court would address related questions in *Ayotte*, however, the Commonwealth observed that "if the Court concludes that federal courts may permit facial challenges alleging overbreadth *and* that the Constitution requires a health exception, then the appropriate course would be to deny certiorari." (*Id.* 4 n.4.) Given that this Court has once again applied its precedent requiring an exception to protect a woman's health in a statute that restricts access to abortion, *Ayotte*, 126 S. Ct. at 967, and given that the Court once again allowed a facial challenge to an abortion restriction, *id.* at 969, as conceded by Petitioners, the proper course here is to deny the petition.

Recognizing that it cannot overcome the evidentiary record in this case, the Commonwealth seeks, in effect, to have this Court overrule *Stenberg*'s requirement that a statute banning abortion procedures supported by substantial medical authority include an exception to protect the woman's health. The grounds asserted in support of the Petition do not, however, provide a sound basis on which to revisit the holding of that case, decided by this Court just over five years ago.

To the contrary, the courts below faithfully followed this Court's decision in *Stenberg*, and the strong evidentiary record in this case demonstrates once more that intact D&E procedures, which are among the procedures banned by the Virginia statute, provide significant safety advantages for some women. Moreover, as the Commonwealth concedes, its position conflicts with the conclusions of every federal court to have considered whether a health exception is necessary since *Stenberg* was announced. Thus, reconsideration of *Stenberg* is unwarranted.

Nor does the Court's decision in *Ayotte* suggest the need for any further consideration of the relief that the District

Court issued, because there is no relief short of facial invalidation that will preserve the constitutionality of the statute while maintaining consistency with the intent of the Virginia Legislature when it enacted the law. Therefore, the Petition should be denied.

COUNTERSTATEMENT

1. Virginia's "Partial Birth Infanticide" Act, Chapters 961 and 963, 2003 Acts of the Virginia General Assembly, Virginia Code § 18.2-71.1 (hereinafter "the Act"),[1] is the latest in Virginia's campaign to ban medically appropriate abortion procedures without exception for circumstances where they are the safest for the woman. In *Richmond Medical Center for Women v. Gilmore,* 224 F.3d 337 (4th Cir. 2000), the Court of Appeals invalidated Virginia's predecessor "partial-birth abortion" statute. Observing that the predecessor statute was "in particulars relevant here . . . indistinguishable from the Nebraska statute at issue" in *Stenberg,* the *Gilmore* court affirmed the district court's judgment of unconstitutionality on the ground that the statute constituted an undue burden on a woman's right to choose an abortion and did not contain a health exception. 224 F.3d. at 339. Three years later, rather than heeding this Court's admonitions in *Stenberg*, which should have called a halt to this campaign, the Virginia Assembly passed the Act, and deliberately repeated the errors that proved fatal to the Nebraska statute struck down in *Stenberg* and the Virginia statute struck down in *Gilmore.*

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[1] The Act is entitled the "Partial Birth Infanticide" Act, but notably is codified at Article 9 ("Abortion") of Title 18.2 ("Crimes and Offenses Generally"), Chapter 4 ("Crimes Against the Person") of the Virginia Code, in the midst of a series of abortion regulations. *See* Va. Code Ann. §§ 18.2-71 ("Producing abortion or miscarriage, etc.; penalty"), 18.2-72 ("When abortion lawful during first trimester of pregnancy").

The Act prohibits what it now terms "partial birth infanticide."[2] It excludes certain abortion procedures from coverage, including suction curettage, suction aspiration, and some non-intact "dilation and evacuation" (D&E) procedures. However, the Act *explicitly* limits the exemption provided to non-intact D&E procedures to a subset of those procedures involving "dismemberment of the fetus prior to removal from the body of the mother." Va. Code Ann. § 18.2-71.1(B). As the District Court found, by excluding only a subset of non-intact D&E procedures from the reach of the prohibition, the Act prohibits all other non-intact D&E variations, as well as intact D&Es.[3] (Pet. App. 68-69 [FF ¶¶ 27, 28].)[4] The Act makes no distinctions based on gestational age and applies to pre-viability abortions early in the second trimester, at approximately 14 weeks of pregnancy as measured from the first day of the woman's last menstrual period ("lmp"). (Pet. App. 65, 77 [FF ¶¶ 19, 53].)[5]

As noted above, the Act contains no exception to its prohibition for circumstances "where it is necessary, in appropriate medical judgment for the preservation of the . . .

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[2] The Act defines "partial birth infanticide" as:

> any deliberate act that (i) is intended to kill a human infant who has been born alive, but who has not been completely extracted or expelled from its mother, and that (ii) does kill such infant, regardless of whether death occurs before or after extraction or expulsion from its mother has been completed.

Va. Code Ann. § 18.2-71.1(B). The Act then defines "infant who has been born alive" to include previable fetuses that are still partially in the pregnant woman's body. Va. Code Ann. § 18.2-71.1(C), (D).

[3] The purpose of the Act is thus less obscured than it was in the Nebraska statute at issue in *Stenberg*. The Act *explicitly* prohibits more than intact D&E by exempting only some non-intact D&Es depending on how they progress, leaving the others to be grouped with intact D&Es and labeling them all a form of "infanticide."

[4] The Appendix to the Petition for Certiorari is cited as "Pet. App." "FF ¶" refers to the District Court's factual findings.

[5] Because conception occurs 2 weeks after the lmp date, 14 weeks lmp equals 12 weeks from conception.

health of the mother," *see Stenberg*, 530 U.S. at 931, 937 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 879 (1992)); Va. Code Ann. § 18.2-71.1, and provides only a limited exception for the life of the woman, Va. Code Ann. § 18.2-71.1(E). The Virginia General Assembly rejected amendments to the Act that would have provided an exception for some circumstances when the woman's health was at risk. (Pet. App. 63 [FF ¶ 9].)

The record shows that Respondent Dr. Fitzhugh is a board-certified obstetrician/gynecologist who is a clinical instructor in the Department of Obstetrics and Gynecology at the Medical College of Virginia and Virginia Commonwealth University and has a private practice in obstetrics and gynecology. As part of his practice, he performs abortions and treats women who are experiencing incomplete miscarriages. (Pet. App. 64 [FF ¶¶ 13-14].) The District Court found that in performing abortions and completing miscarriages, Dr. Fitzhugh encounters circumstances in which completing the procedure in the safest, most medically appropriate manner will constitute the crime of "partial birth infanticide." (Pet. App. 87-88.)

Dr. Fitzhugh provides abortions through twenty weeks lmp. (Pet. App. 65 [FF ¶ 16].) Starting at approximately fourteen weeks lmp, Dr. Fitzhugh uses the D&E method, the most common method of pre-viability second-trimester abortion, which accounts for approximately 96% of all second-trimester abortions in the United States. (Pet. App. 65-66 [FF ¶¶ 19, 22].)

When performing these D&Es, Dr. Fitzhugh removes the pre-viable fetus from the woman's uterus through her cervix, vagina, and vaginal introitus[6] using a combination of suction

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[6] During a D&E, Dr. Fitzhugh uses a speculum to hold the vagina open and a tenaculum to apply traction to the cervix. The tenaculum also stabilizes the cervix and holds it closer to the vaginal introitus, or opening. (Pet. App. 66 [FF ¶ 23].) Depending on the woman's body and

and forceps. (Pet. App. 66 [FF ¶ 22].) *See also Stenberg*, 530 U.S. at 925-26; *Richmond Med. Ctr. for Women v. Gilmore*, 55 F. Supp. 2d 441, 472 (E.D. Va. 1999) [hereinafter *RMCW*]. As Petitioners concede and the District Court found, Dr. Fitzhugh may violate the Act when performing a D&E whether or not he performs a D&E or an "intact D&E." (Pet. App. 77 [FF ¶ 52]; *see also* Pet. App. 12.)

As the District Court also found, in advance of beginning a procedure, physicians performing D&Es cannot know exactly what operative steps will be necessary to remove a fetus or whether the fetus will remain intact. (Pet. App. 70-71 [FF ¶ 32].) The exact manner in which Dr. Fitzhugh performs a D&E will vary depending on the structure and responsiveness of an individual woman's reproductive organs and other surgical conditions and is informed by his experience, skills, and judgments about the woman's health. (*Id.*) The District Court found that there is no way for Dr. Fitzhugh to know before he begins any given procedure whether that particular D&E will result in a situation where he must take steps in violation of the Act in order to complete the abortion in the manner he deems most appropriate for the woman's health. Consequently, because Dr. Fitzhugh could face criminal prosecution under the Act for some D&Es he performs, he faces the possibility of such prosecution *each and every time* he performs any D&E abortion. (Pet. App. 77 [FF ¶ 53].)

As the District Court also found, the evidence demonstrates that the D&Es and intact D&Es that Dr. Fitzhugh performs and that are prohibited by the Act have

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the use of instrumentation during the D&E, at that point the woman's cervical os may be slightly inside the vaginal introitus, in line with the vaginal introitus, or even beyond the vaginal introitus (outside of the woman's body). (Pet. App. 67 [FF ¶ 24].) Petitioners' expert agreed that in some women the cervical os and the vaginal introitus are within one or two centimeters of each other. (Pet. App. 67 [FF ¶ 26].)

many safety advantages over D&Es not prohibited by the Act, including reduced risks of serious complications, such as uterine perforation, cervical rupture, infection, and retained fetal tissue. (Pet. App. 69-70 [FF ¶ 31].) *See also, e.g., Stenberg*, 530 U.S. at 936-37; *Planned Parenthood Fed'n of Am. v. Gonzales*, No. 04-15521, 2006 WL 229900, at *8 (9th Cir. Jan. 31, 2006); *Carhart v. Gonzales*, 413 F.3d 79, 801-03 (8th Cir. 2005); *RMCW*, 55 F. Supp. 2d at 453. Such D&Es may also result in less blood loss and less trauma for some patients. (Pet. App. 69-70 [FF ¶ 31].)

2. The District Court held that the Act violated the privacy interests of women secured by the due process clause for two reasons. First, the District Court held that the Act is "unconstitutional because it fails to contain a health exception." (Pet. App. 85.) Citing record evidence, the District Court found that "[t]here is substantial medical authority, *including testimony from the defendants' experts*, that supports the proposition that banning D&Es, and the manner in which Dr. Fitzhugh performs D&Es, including intact D&Es, could endanger women's health." (Pet. App. 87 [emphasis added].) The District Court pointed to the opinions of Dr. Fitzhugh and another expert witness, who testified, based on their experience and other medical authority, "that the manner in which Dr. Fitzhugh performs D&Es that are prohibited by the Act is both the safest and medically appropriate for some of his patients. . . ." (*Id.*) It observed that "defendants' own expert" did not disagree, having "testified that the manner in which Dr. Fitzhugh completes D&Es is medically acceptable and that criminalizing the way Dr. Fitzhugh performs them could endanger women's health." (Pet. App. 88.)

The District Court found that Petitioners had failed to meet their burden for upholding the Act despite its lack of a health exception. The District Court found that Petitioners had produced no credible evidence controverting the

evidence adduced by Respondents that the manner in which Dr. Fitzhugh performs D&Es is the safest for his patients.

The District Court observed that even if Petitioners *had* presented admissible opinion evidence to contradict the Respondents' medical testimony, they would not have met their burden unless they "prov[e] that a health exception is *never* necessary to preserve the health of women." (Pet. App. 88 [citing *Stenberg*, 530 U.S. at 937-38]; *see also id.* at 88-89 ["'Where a significant body of medical opinion believes a procedure may bring with it greater safety for some patients and explains the medical reasons supporting that view, we cannot say that the presence of a different view by itself proves the contrary.'"] [quoting *Stenberg*, 530 U.S. at 938].) Even were that not the standard, though, Petitioners still would not have met their burden because, in this case, the Petitioners produced *no* credible evidence whatsoever to contradict Respondents' evidence that an exception is necessary to protect women's health.

Second, the District Court held that the Act "also places an undue burden on women's constitutional right to choose an abortion." (Pet. App. 90 ["The plain language of the Act bans pre-viability D&Es and would cause those who perform such D&Es to fear prosecution, conviction and imprisonment."].) It found that the Act, like the Nebraska statute at issue in *Stenberg* and Virginia's predecessor abortion ban, "ignores the Supreme Court's 'established [] line of demarcation for a State's ability to regulate and proscribe abortion in terms of whether the fetus was viable or nonviable'. . . ." (Pet. App. 90 [quoting *RMCW*, 55 F. Supp. 2d at 480].) It concluded that "the Act also places an undue burden on a woman's ability to choose a D&E abortion and therefore unduly burdens 'the right to choose abortion itself.'" (Pet. App. 90 [quoting *Stenberg*, 530 U.S. at 930 (quoting *Casey*, 505 U.S. at 874)].)

The District Court also found unconstitutional the Act's so-called "life exception," Va. Code. Ann. § 18.2-71.1 (E),[7] because it "impermissibly requires physicians to prioritize the 'health and life' of a pre-viable fetus ahead of the well-being of a woman seeking an abortion." (Pet. App. 91.) It found that the life exception is limited to situations where the prohibited abortion procedure is the only procedure available to save the life of the woman, and would not apply if procedures more dangerous to the health of the woman, such as induction, hysterotomy, or hysterectomy, could be used to prevent death. "Therefore, the 'life exception' forces women to undergo riskier abortion procedures, even when the abortion is necessary to safe her life," in conflict with the constitutional requirement that "'a State may promote but not endanger a woman's health when it regulates the methods of abortion.'" (*Id.* [quoting *Stenberg*, 530 U.S. at 931].) The District Court additionally held that the "life exception" requires an unconstitutional "trade-off" between women's health and survival of a non-viable fetus. That is because, in order for a physician to utilize a prohibited procedure and avoid prosecution, the Act requires the physician to take "every medically reasonable step, consistent with such procedure, to preserve the life and health" of the non-viable fetus. Va. Code Ann. § 18.2-71.1(E). "[W]hen state legislation demands such a 'trade-off' before fetal viability, it

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[7] Va. Code. Ann. § 18.2-71.1(E) provides:

> This section shall not prohibit the use by a physician of any procedure that, in reasonable medical judgment, is necessary to prevent the death of the mother, so long as the physician takes every medically reasonable step, consistent with such procedure, to preserve the life and health of the infant. A procedure shall not be deemed necessary to prevent the death of the mother if completing the delivery of the living infant would prevent the death of the mother.

places a 'substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.'" (*Id.* [quoting *RMCW*, 55 F. Supp. 2d at 485].)

The District Court also found the Act "void for vagueness, in violation of the Due Process Clause, because its failure to clearly define the prohibited medical procedures deprives physicians of fair notice." (Pet. App. 92.) It found several of the terms of the act "especially ambiguous," and deemed the "life exception . . . so confusing as to be meaningless." *Id.* 94 It concluded that the "Act does not meet the high degree of clarity required where 'the uncertainty induced by the statute threatens to inhibit the exercise of constitutional rights.'" (*Id.* 94 [quoting *RMCW*, 55 F. Supp. 2d at 494 (quoting *Colautti v. Franklin*, 439 U.S. 379 (1979))].)

3. In affirming the District Court's judgment, the Court of Appeals rejected the Commonwealth's arguments that the Act could survive scrutiny without a health exception and that the District Court had incorrectly allowed an attack on overbreadth grounds.

As the Court of Appeals observed, this Court reached its conclusion that the Nebraska statute was unconstitutional based on a wide-ranging review of medical authority comprising the District Court record supplemented with information from a significant array of extra-record medical sources. The Court of Appeals summarized this Court's opinion in *Stenberg* as "hold[ing] that any statute prohibiting the intact D&E/D&X procedure necessarily 'creates a significant health risk' because 'substantial medical authority' confirms the procedure's utility in safeguarding women's health.'" (Pet. App. 11 [quoting *Stenberg*, 530 U.S. at 938].) The Court of Appeals concluded that "[a]ny such statute" – that is, any statute prohibiting the intact

D&E/D&X procedure – "'must [therefore] contain a health exception.'" (*Id.* [quoting *Stenberg*, 530 U.S. at 938].)[8]

The Court of Appeals noted that "it is not disputed in this case that the Act – like the Nebraska statute in [*Stenberg*] – prohibits the intact D&E/D&X procedure." (Pet. App. 12.) It also found "undisputed" that the Act makes no provision for those situations in which the intact D&E/D&X procedure is necessary in appropriate medical judgment for the preservation of the health of the woman. (Pet. App. 13.) It rejected the dissent's argument that the Act does not need a health exception because, unlike the Nebraska statute, it permits some non-intact D&Es. It observed that in *Stenberg*, the "Court addressed the question of whether a health exception was constitutionally required in the context of Nebraska's attempt to criminalize the intact D&E/D&X procedure." (Pet. App. 12.)

It also rejected the Commonwealth's claim that Respondents failed to present substantial medical authority for the proposition that a health exception is needed in "this particular statute" (Pet. App. 14), discussing in detail the

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[8] The Court of Appeals delineated the reasons that informed this Court's "conclu[sion] that substantial medical authority supports the proposition that the intact D&E/D&X procedure offers significant health and safety advantages over alternative methods of late-term abortion." (Pet. App. 10.) First, the procedure allows the fetus to pass through the cervix in one pass, thus reducing operating time, blood loss, trauma, the risk of instrument-inflicted damage to the uterus and of injury from fetal bone fragments, and other risks. Second, the procedure prevents the most common causes of maternal mortality (disseminated intravascular coagulation and amniotic fluid embolus) and eliminates the possibility of serious complications arising from retained fetal tissues. Third, it reduces the risk of cervical injury in circumstances involving nonviable fetuses, because reduction of the fetal calvarium allows a smaller diameter to pass through the woman's cervix. Fourth, the procedure can mitigate the special risks faced by women with prior uterine scars or for whom abortion by induction would be especially dangerous. (Pet. App. 10-11.)

District Court's contrary finding.[9] It concluded that the record evidence, even if the inadmissible evidence offered by the Commonwealth were considered, "would at most indicate some division of medical opinion on the question of whether 'banning [the intact D&E/D&X] procedure could endanger women's health.'" (Pet. App. 14-15 n.1 [quoting *Stenberg*, 530 U.S. at 938].) As this Court noted, the division of "substantial" medical opinion signals the presence of risk, not its absence; thus, "the absence of a health exception will place women at an unnecessary risk of tragic health consequences." *Stenberg*, 530 U.S. at 938.

4. The Commonwealth's petition to the Court of Appeals for a rehearing and rehearing *en banc* was denied by a vote of 10 to 2.

REASONS FOR DENYING THE WRIT

I. There is No Division of Authority that a Statute Banning Intact D&E Abortions Must Contain a Health Exception.

This is a simple case in light of the Commonwealth's concession that the Act would criminalize the intact D&E abortions and some non-intact D&Es that Dr. Fitzhugh performs. (*See* Pet. App. 12 [quoting Petitioners' statements to the Court of Appeals that the Act "does not allow . . . an "intact D&E'" and identifying the "[t]he central issue in this case" as "'whether [Virginia] may prevent use of the . . . intact D&E' procedure"].) The Virginia statute is unconstitutional for precisely the same reasons as was the Nebraska statute in *Stenberg* — because it fails to contain the

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[9] The Court of Appeals also interpreted *Stenberg* as establishing a constitutional rule requiring a health exception when a statute bans the intact D&E/D&X procedure. (Pet. App. 14) As discussed below, however, because the Respondents not only did reproduce the body of medical authority considered by this Court in *Stenberg*, but also supplemented it, this question is not dispositive here.

requisite exception to its prohibitions when necessary to preserve a woman's health.

In *Stenberg,* this Court applied the well-established rule that a restriction on abortion "requires an exception where it is necessary, in appropriate medical judgment for the preservation of the life or health of the mother, for this Court has made clear that a State may promote but not endanger a woman's health when it regulates the methods of abortion." *Stenberg*, 530 U.S. at 931 (internal quotations and citations omitted). This Court held that, even if the Nebraska statute had banned only intact D&Es, it was unconstitutional because it did not contain a health exception. The Court noted that state regulations cannot "force women to use riskier methods of abortion." *Id.* As noted, in *Ayotte,* this Court again recognized and applied this core principle when it affirmed the lower court's ruling that the parental notification statute at issue there was unconstitutional because it lacked a health exception and remanded for determination of the appropriate remedy. *Ayotte*, 126 S. Ct. at 967, 969.

This Court concluded in *Stenberg* that given "a District Court finding that D&X significantly obviates health risks in certain circumstances, [and] a highly plausible record-based explanation of why that might be so, . . . we believe the law requires a health exception." *Id.* at 936-37. Because the Act bans at least intact D&E procedures and the record overwhelmingly supports the District Court's conclusion that the intact D&E procedure provides significant safety advantages to women, this case is, as the Court of Appeals held, wholly governed by the decision in *Stenberg*.[10]

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[10] Given the District Court's finding that there is testimony from even Petitioners' own experts "that supports the proposition that banning D&Es, and the manner in which Dr. Fitzhugh performs D&Es, including intact D&Es, could endanger women's health" (Pet. App. 87), the record permits no other conclusion but that "significant medical authority

Contrary to the Commonwealth's assertion, the judgment of the Court of Appeals does not stand for the proposition that "once it is established that a statute regulates abortion, the actual risks, if any, created by the statute and the extent of medical authority, if any, supporting the existence of such risks, are irrelevant." (Pet. 20.) Rather, the Court of Appeals read *Stenberg* to establish the health exception requirement as a constitutional rule when, like the Act, a statute bans the intact D&E procedure. Far from finding irrelevant the nature of the risks created by the Act or the extent of medical authority establishing them, the Court of Appeals placed those considerations at the center of its analysis. In concluding that a ban on intact D&E abortions is unconstitutional without a health exception, the Court of Appeals gave proper respect to the findings of this Court in *Stenberg*. It stated that "[t]his rule is based on substantial medical authority (from a broad array of sources) recognized by the Supreme Court, and this body of medical authority does not have to be reproduced in every subsequent challenge to a 'partial birth abortion' statute lacking a health exception." (Pet. App. 14.) Other courts of appeals that have considered the question agree with that conclusion. *See Carhart v. Gonzales*, 413 F.3d 791, 800 (8th Cir. 2005) (whether a health exception is required for a ban on the intact D&E/D&X procedure is a "question of legislative fact" answered by *Stenberg*; "subsequent litigants need not relitigate questions the Supreme Court has already addressed."); *A Woman's Choice - E. Side Women's Clinic v. Newman*, 305 F.3d 684, 688 (7th Cir. 2002) ("Only treating the matter as one of legislative fact produces the nationally uniform approach that *Stenberg* demands."); *cf. Planned Parenthood Fed'n of Am. v. Gonzales*, No. 04-16621, 2006 WL 229900, at *16-20 (9th Cir. Jan. 31, 2006) (holding federal partial birth abortion act unconstitutional because it

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supports the proposition that in some circumstances, [intact D&E] would be the safest procedure." *Stenberg*, 530 U.S. at 932.

lacks a health exception); *Nat'l Abortion Fed'n v. Gonzales*, No. 04-5201-CV, 2006 WL 225828, at *1, *6 (2d Cir. Jan. 31, 2006) (same).[11] The Commonwealth cites no authority to the contrary (Pet. 20), nor could it.

But, importantly, even if *Stenberg* does not establish the health exception requirement as a constitutional rule when a statute bans the intact D&E procedure, the record evidence demonstrates that the Act is unconstitutional. That is because, as the Court of Appeals found, the medical authority before the District Court "is strikingly similar to that considered by the Supreme Court in [*Stenberg*]." (Pet. App. 14 n.1.)[12] Accordingly, the Petition should be denied.

II. There is No Sound Reason to Review the Remedy Ordered by the Lower Courts.

The District Court, consistent with the result in *Stenberg*, declared the Act facially unconstitutional on several theories and enjoined its enforcement in its entirety. The Court of Appeals, affirming the finding that the Act is unconstitutional

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[11] The panel noted the many district courts in agreement. (Pet. App. 16-17.) *See Reprod. Health Servs. of Planned Parenthood of the St. Louis Region, Inc. v. Nixon*, 325 F. Supp. 2d 991, 994-95 (W.D. Mo. 2004); *Planned Parenthood Fed'n of Am. v. Ashcroft*, 320 F. Supp. 2d 957, 1013 (N.D. Cal. 2004); *WomanCare of Southfield, P.C. v. Granholm*, 143 F. Supp. 2d 849, 855 (E.D. Mich. 2001); *Summit Med. Assocs. v. Siegelman*, 130 F. Supp. 2d 1307, 1308, 1314 (M.D. Ala. 2001); *Daniel v. Underwood*, 102 F. Supp. 2d 680, 681, 684 (S.D. W. Va. 2000).

[12] It pointed to the testimony of Dr. Fitzhugh and Respondents' expert that "the intact D&E/D&X abortion procedures . . . are the safest and most medically appropriate for some women" and to the Petitioners' expert's testimony that agreed the procedure is "safe and medically appropriate" and should be permitted if physicians "think to do otherwise 'would endanger the woman's health.'" (*Id.*) As further support, the Court of Appeals also cited an *amicus* brief submitted on behalf of thousands of physicians with expertise in reproductive health and abortion procedures urging that "the intact D&E/D&X procedure is an accepted medical procedure that is often the safest available." (Pet. App. 14 n.1.)

because it does not contain a health exception, upheld the facial invalidation of the Act. In its Petition, the Commonwealth asks this Court to review whether federal courts must apply the "no set of circumstances" test of *United States v. Salerno*, 481 U.S. 739, 745 (1987), in a facial challenge to an abortion statute.

However, in *Ayotte*, this Court reaffirmed that plaintiffs may bring preenforcement facial challenges to restrictions on abortion and need not establish that the restriction is unconstitutional in all circumstances to obtain relief.[13] This Court also held that facial invalidation of an abortion statute *in toto* may be the appropriate remedy in some circumstances. Thus, there is no reason to grant Virginia's petition to revisit this question. Nor does the decision in *Ayotte* provide a reason to remit the matter to the lower courts for reconsideration of the remedy they entered, because the considerations outlined in *Ayotte* compel the conclusion that facial invalidation of the Act is the only available remedy.

In *Ayotte*, this Court emphasized "[t]hree interrelated principles" that must guide the courts when considering the remedy for a statute that unconstitutionally impedes access to abortion. *Ayotte*, 126 S. Ct. at 967. First, the court should try to invalidate no more of a statute than is necessary. *Id.* Second, "mindful that [the courts'] constitutional mandate and institutional competence are limited," courts must "restrain [themselves] from 'rewrit[ing] a state law to conform it to constitutional requirements' even as [they] strive to salvage it." *Id.* (quoting *Virginia v. Am. Booksellers*

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[13] Thus, *Ayotte* puts to rest any doubt that, contrary to the Commonwealth's contention, *Salerno*'s "no set of circumstances" rule has not been the standard litigants must meet in order to succeed in invalidating an unconstitutional statute on its face. *See Sabri v. United States*, 541 U.S. 600, 609-10 (2004) ("recognize[ing] the validity of facial attacks alleging overbreadth (though not necessarily using that term)" in several settings, including free speech and abortion cases).

Ass'n., 484 U.S. 383, 397 (1988)) (third alteration in the original). Finally, "a court cannot 'use its remedial powers to circumvent the intent of the legislature,'" *id.* (quoting *Califano v. Westcott,* 443 U.S. 76, 94 (1979) (Powell, J., concurring in part and dissenting in part)). Thus, after finding an application or portion of a statute unconstitutional, the courts must ask: "Would the legislature have preferred what is left of its statute to no statute at all?" *Id.* When answering this last question, the courts must be "wary of legislatures who would rely on our intervention" by setting "'a net large enough to catch all possible offenders, and leave it to the courts to step inside' to announce to whom the statute may be applied." *Id.* (quoting *United States v. Reese,* 92 U.S. 214, 221 (1875)). Applying these three principles to this case, it is plain that facial invalidation of the Act is the only appropriate remedy.

A. Injunctive Relief Engrafting a Health Exception Onto the Act Would Conflict With the Legislature's Intent.

Even if the Act's prohibition were limited to intact D&Es and it was unconstitutional solely because it lacked a health exception, entry of an injunction that prevented application of the Act to circumstances where the banned procedures were the safest would not be warranted because it would conflict with the intent of the Virginia Legislature. The General Assembly's repeated efforts to ban medically appropriate methods of abortion without providing a medical exception reflect the Legislature's preference for no statute at all to one that conforms to constitutional mandates.

The District Court found that the "General Assembly rejected amendments . . . that would have provided an exception for some circumstances when the woman's health was at risk." (Pet. App. 63 [FF ¶ 9].) *See also* H.B. 1541, 2003 Leg., Reg. Sess. (Va. 2003); S.B. 1205, 2003 Leg., Reg. Sess. (Va. 2003.) The Legislature eschewed the inclusion of

a provision that provided a health exception against the background not only of this Court's judgment in *Stenberg*. It refused the Governor's recommendation to include a health exception even though its enactment of a similarly defective statute had recently failed constitutional review for the very same reason, after *Stenberg* was announced. *See Richmond Med. Ctr.*, 224 F.3d at 338-39. The Legislature's resistance to the inclusion of a health exception in a "partial birth abortion" statute in the face of repeated judicial warnings of its necessity unambiguously confirms that it considered omission of a health provision a critical component of the Act. As the court noted in *Planned Parenthood Federation*, affirming the facial invalidation of a similar federal statute:

> Congress, notwithstanding existing Supreme Court law and the multiple opportunities it was given to limit the Act's scope, passed an overly broad ban that it was aware likely violated the Constitution. . . . Congress left it to the judiciary to sort out which parts of the statute are constitutional and which are not. This is precisely what *Ayotte* reminded us Congress may not do.

2006 WL 229900, at *19. A judicial remedy that would save the Act under these circumstances would surely invite Virginia's and other states' legislatures to flout such admonitions in the future.

Nor could one conclude that the Legislature would have "preferred what is left of its statute to no statute at all." *See Ayotte*, 126 S.Ct. at 968. As the court in *Planned Parenthood Federation* pointed out, the judiciary is ill-equipped to determine how a legislature "would exercise its moral and other judgments with respect to tactical political decisions," such as the judgments that were undoubtedly

involved in the drafting of and advocacy for the Act. *Planned Parenthood Fed'n*, 2006 WL 229900, at *18.[14]

The Act does not present an opportunity for a court "to sever its problematic portions while leaving the remainder intact," *Ayotte*, 126 S. Ct. at 967 (citing *United States v. Booker*, 543 U.S. 220, 227-29 (2005)), because the Act's constitutional defect results from an omission that obviously cannot be severed from the remainder. The only way to *remove* language to cure the constitutional defect would be to delete the very core of the Act, that is, the prohibition on procedures set forth in subsection B. If it were, nothing of the Act would remain.[15]

Engrafting a health exception onto the Act when the Commonwealth has been at pains to avoid its inclusion would conflict with the Legislature's intent and would be inconsistent with the courts' proper role. Accordingly, there is no reason for further consideration of the relief ordered by the lower courts.

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[14] Even if it were possible to draft an injunction that prevented the application of the statute where the banned procedures were the safest for the patient, it is unclear what, if anything, such an injunction would leave to enforce. Dr. Fitzhugh does not perform procedures banned by the Act unless they are the safest. His medical practice is devoted to just this aim.

[15] Further, the Legislature did not include a severability provision in the Act. In *Ayotte*, this Court considered the inclusion of a severability clause as an indication of the New Hampshire Legislature's intent that the statute there under review was susceptible of an injunction against unconstitutional applications. Although it is true that the Commonwealth has a statutory severability provision applicable to all of its enactments, *see* Va. Code. Ann. § 1-243, the existence of that general provision does little to demonstrate the Legislature's preference for a health exception over no statute at all.

B. *Ayotte* Precludes Drafting Injunctive Relief to Cure the Statute's Overbreadth.

As the District Court held, the Act is unconstitutional for reasons in addition to its failure to include an exception to the prohibition on the intact D&E procedure to preserve the health of the pregnant woman. As the District Court held, its "plain language . . . bans pre-viability D&Es and would cause those who perform such D&Es to fear prosecution, conviction and imprisonment." (Pet. App. 90.)[16] Like the Nebraska statute at issue in *Stenberg*, then, the Act "impos[es] 'an undue burden on a woman's ability' to choose a D&E abortion," and therefore "unduly burdens 'the right to choose abortion itself.'" (Pet. App. 90 [quoting *Stenberg*, 530 U.S. at 930 (quoting *Casey*, 505 U.S. at 874)].)

Issuing an injunction to narrow the scope of the prohibition would require the courts to strike the principal section delineating the prohibition and draft a completely new section with new terms and new definitions. In doing so, the courts would be required to "make decisions that are the prerogative of elected officials and thus would be inconsistent with the proper distribution of responsibilities between the legislative and judicial branches." *Planned Parenthood Federation*, 2006 WL 229900, at *19. It would also violate the Legislature's clear intent to include some non-intact D&Es within the prohibition. Thus, the Act does not present a situation where "the legitimate reach of [the statute] 'dwarfs its arguably impermissible applications.'" *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984) (quoting *New York v. Ferber*, 458 U.S. 747, 773 (1982)).

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[16] As noted above, the prohibited procedures explicitly include not only the intact D&E but also a subset of non-intact D&Es where disarticulation of a fetus occurs when the fetus is partially in and partially out of the woman's body. This can happen when there is little or no space between the cervical os and the vaginal introitus or when the cervical os prolapses outside the vaginal introitus (Pet. App. 7), a circumstance confronted by Dr. Fitzhugh in one-third of his patients.

The Commonwealth argues that the statute should remain in effect to prevent a full term baby from being killed in the process of delivery (Pet. 14), citing a number of newspaper articles. Not only is there no evidence that the Virginia Legislature contemplated the horrific examples the Commonwealth dreams up, the articles it cites do not involve the type of killings it claims the Legislature was concerned with when it codified the Act in the "abortion" section of the criminal code, much less describe incidents that occurred in Virginia. There is little to be gained for the legislative process, and much to be lost by the judiciary, if the courts are to engage in drafting of an injunction to preserve the application of the Act only to conduct that the legislature did not likely consider.

C. Invalidation of the Entire Statute is Also Required Because the Act is Void for Vagueness.

As the District Court held, the Act is also unduly vague because it fails to give adequate notice as to what conduct is prohibited. (Pet. App. 93-94.)[17] As this Court has held, the vagueness doctrine permits wholesale invalidation of a statute in a "facial challenge if the law reaches 'a substantial amount of constitutionally protected conduct.'" *Kolender v. Lawson*, 461 U.S. 352, 358 n.8, 361-62 (1983) (facially invalidating statute requiring persons validly stopped by police to provide "credible and reliable" identification) (quoting *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982)). Such is the case here.

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[17] As the District Court held, the Act is also unconstitutional because its "life exception" is inadequate (Pet. App. 91) and because it could subject a physician to prosecution for completing a miscarriage in a safe and medically appropriate manner for a woman who presents in mid-miscarriage. (Pet. App. 74-75 [FF ¶ 47], 92.)

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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In The
Supreme Court of the United States

MICHAEL HERRING, in his official capacity as Commonwealth's Attorney for the City of Richmond, and WADE A. KIZER, in his official capacity as Commonwealth's Attorney for the County of Henrico,

Petitioners,

v.

RICHMOND MEDICAL CENTER FOR WOMEN, and WILLIAM G. FITZHUGH, M.D.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The Attorney General of the Commonwealth of Virginia, Robert F. McDonnell, on behalf of Michael Herring, in his official capacity as Commonwealth's Attorney for the City of Richmond, and Wade A. Kizer, in his official capacity as Commonwealth's Attorney for Henrico County (collectively "Virginia"), submits this Reply Brief in Support of the Petition for a Writ of Certiorari.

As *Ayotte v. Planned Parenthood,* 126 S. Ct. 961 (2006), demonstrates, the lower court erred when it invalidated Virginia's statute on its face. Thus, at a minimum, this Court should grant certiorari, vacate the judgment, and remand for further proceedings in light of *Ayotte*. *See National Abortion Fed'n v. Gonzales*, ___ F.3d ___, ___, 2006 WL 225828 at *1 (2nd Cir. 2006) (deferring ruling on the issue of remedy until after supplemental briefing concerning the impact of *Ayotte*).[1] However, while *Ayotte* made it clear that the court of appeals' remedy is improper, *Ayotte* failed to resolve the two fundamental questions on which this Court granted certiorari. Those questions remain worthy of this Court's review and this Petition remains an ideal vehicle for resolving both issues. Thus, this Court should grant certiorari to resolve the questions presented. In the alternative, this Court should grant, vacate, and remand for further proceedings consistent with *Ayotte*.

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[1] Of course, the Ninth Circuit found it unnecessary to remand in light of *Ayotte* and, instead, simply declared that Congress preferred allowing all partial birth abortions to banning most partial birth abortions. *See Planned Parenthood Fed'n of America, Inc. v. Gonzales*, ___ F.3d ___, ___, 2006 WL 229900 at *17-20 (9th Cir. 2006). The Ninth Circuit's conclusion is unfounded and represents a fundamental misunderstanding of *Ayotte*.

I. REVIEW SHOULD BE GRANTED TO DETERMINE WHETHER FEDERAL COURTS MAY ALLOW OVERBREADTH CHALLENGES TO ABORTION STATUTES.

Review should be granted to determine whether federal courts may allow facial challenges alleging overbreadth to abortion statutes.

Contrary to the assertions of Dr. Fitzhugh, this Court has never *explicitly* held that facial challenges alleging overbreadth of abortion statutes are permitted. *See National Abortion Fed'n*, ___ F.3d at ___, 2006 WL 225828 at *12-13 (Walker, C.J., concurring).[2] Indeed, this Court has explicitly applied the "no set of circumstances" test set forth in *United States v. Salerno*, 481 U.S. 739, 745 (1987) in the abortion context. *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 514 (1990) (statute requiring parental notification). *See also*

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[2] As Chief Judge Walker explained:

> There may be adequate reasons for suspending *Salerno's* "no set of circumstances" test in the field of abortion – including possibly a concern that, under the *Salerno* standard, it would be difficult for a woman to bring an as-applied challenge under exigent circumstances. But the Supreme Court has never told us what has happened to the *Salerno* doctrine in the abortion context; it has never balanced the jurisprudential and administrative considerations associated with jettisoning *Salerno* against whatever medical concerns might militate in favor of a modified standard of proof. More importantly, the Court has never considered whether [*Planned Parenthood v.*] *Casey* or *Stenberg* struck the appropriate balance. Perhaps a better standard can be articulated – one that requires a regulation's challenger to make an affirmative showing of proof regarding the way in which women will be adversely affected by the challenged abortion regulation. Instead, the Court has sanctioned a mode of constitutional analysis that permits the lower courts to invalidate an abortion regulation based upon a speculative showing that the challenged provision *might* work an unconstitutional result.

Id. at ___, 2006 WL 225828 at *12 (Walker, C.J., concurring) (emphasis original; footnotes and citations omitted).

Webster v. Reproductive Health Servs., 492 U.S. 490, 523-24 (1989) (O'Connor, J., concurring) (statute prohibiting use of public facilities for performing abortions). Because this Court has never explicitly addressed the issue, it is not surprising that the Circuits are divided on the question of whether the federal courts may allow facial challenges alleging overbreadth to abortion statutes.[3] While there is language in some recent decisions of this Court *suggesting* that facial challenges alleging overbreadth are permitted in the abortion context, new constitutional standards cannot be created by "dicta in a prior case in which the point now at issue was not fully debated." *Central Virginia Cmty. Coll. v. Katz*, 126 S. Ct. 990, 996 (2006).

The conflict among the Circuits and the irrelevance of dicta from previous decisions supported this Court's grant of certiorari in *Ayotte*. Yet, *Ayotte* failed to resolve the

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[3] The Fifth Circuit has held that such challenges are not permitted. *See Barnes v. Moore*, 970 F.2d 12, 14 n.2 (5th Cir. 1992). *See also Causeway Med. Suite v. Ieyoub*, 109 F.3d 1096, 1102-04 (5th Cir. 1997) (declining to reverse *Barnes*). Moreover, prior to its opinion in *this* case, the Fourth Circuit refused to allow facial challenges alleging overbreadth in the abortion context. *See Greenville Women's Clinic v. Bryant*, 317 F.3d 357, 362-63 (4th Cir. 2004) (*Greenville Women's Clinic II*); *Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 164-65 (4th Cir. 2000) (*Greenville Women's Clinic I*); *Manning v. Hunt*, 119 F.3d 254, 268-69 (4th Cir. 1997). However, other Circuits have concluded that facial challenges alleging overbreadth are permitted in the abortion context. *See Planned Parenthood v. Heed*, 390 F.3d 53, 58 (1st Cir. 2004), *cert. granted sub nom. Ayotte v. Planned Parenthood*, 125 S. Ct. 2294 (2005); *Planned Parenthood v. Farmer*, 220 F.3d 127, 142-43 (3rd Cir. 2000); *Planned Parenthood v. Lawall*, 180 F.3d 1022, 1025-26 (9th Cir.), *amended on denial of reh'g*, 193 F.3d 1042 (9th Cir. 1999); *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 193-97 (6th Cir. 1997); *Jane L. v. Bangerter*, 102 F.3d 1112, 1116 (10th Cir. 1996); *Planned Parenthood v. Miller*, 63 F.3d 1452, 1456-58 (8th Cir. 1995). *Cf. A Woman's Choice-East Side Women's Clinic v. Newman*, 305 F.3d 684, 687 (7th Cir. 2002) (treating the *Salerno* standard as merely a "suggestion" in the abortion context).

issue. *See National Abortion Fed'n*, ___ F.3d at ___, 2006 WL 225828 at *13 (Walker, C.J., concurring) ("The Court, however, chose not to address the most controversial issue before it – the quantum of proof necessary to bring a facial challenge to an abortion regulation.").[4] This Petition presents an ideal vehicle to resolve the question. Certiorari should be granted.

II. REVIEW SHOULD BE GRANTED TO DETERMINE WHETHER THE CONSTITUTION REQUIRES A HEALTH EXCEPTION.

This Court should also grant review to determine whether the Constitution imposes a *per se* rule that a health exception must be included in any statute that regulates partial birth abortion, partial birth infanticide, or similar procedures.[5]

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[4] Although *Ayotte* severely restricts the ability of federal courts to invalidate an abortion statute on its face, the issue of whether federal courts may entertain facial challenges alleging overbreadth in the abortion context remains critically important. At its core, the overbreadth doctrine involves questions of standing – who may challenge a particular statute. *See Virginia v. Hicks*, 539 U.S. 113, 120 (2003). In general, a person may challenge a statute as it applies to their own conduct, but "may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." *New York v. Ferber*, 458 U.S. 747, 767 (1982). Thus, unless a litigant actually violates the statute at issue, the litigant may not challenge that statute. However, the general rule gives way in a few limited situations where the overbreadth doctrine applies. *See Broadrick v. Oklahoma*, 413 U.S. 601, 612-13 (1973). In those limited contexts, a litigant may vindicate the rights of others even though the litigant himself may not have violated the statute at issue.

The distinction is critical in abortion cases. If facial challenges alleging overbreadth are not permitted, then the litigant challenging an abortion statute must demonstrate that he actually engages in conduct that violates the abortion statute at issue. In contrast, if facial challenges alleging overbreadth are permitted, then no such limitation exists.

[5] Of course, this issue is presented by the Petition in *Gonzales v. Carhart*, No. 05-380, which this Court considered at its Friday, February 17

(Continued on following page)

Contrary to the assertions of Dr. Fitzhugh, *Stenberg v. Carhart*, 530 U.S. 914 (2000) did not *explicitly* establish a health exception requirement as a *per se* constitutional rule. While there is language in *Stenberg suggesting* such a *per se* rule, a new constitutional rule cannot be created by "dicta in a prior case in which the point now at issue was not fully debated." *Katz*, 126 S. Ct. at 996. Indeed, some judges have read *Stenberg* more narrowly. *See App.* at 28 (Niemeyer, J., dissenting). As Judge Straub explained:

> [U]nder my reading of *Stenberg*, the ultimate issue remains the necessity of D & X in preserving women's health, to be determined based on substantial medical authority. Where there is a division of medical opinion *and* credible medical explanations supporting both sides of that division, that level of uncertainty indicates a risk to women and requires a health exception. *Stenberg, however, did not set down an immutable ban on the passing of a statute banning D & X without a health exception or suggest that the division of medical opinion alone could require such an exception.*

National Abortion Fed'n, ___ F.3d at ___, 2006 WL 225828 at *18 (Straub, J., dissenting) (emphasis added; citations omitted). In any event, this Court should clarify whether the Constitution establishes a *per se* requirement of a health exception and, if not, exactly when a health exception is required. *See National Abortion Fed'n*, ___ F.3d at ___, 2006 WL 225828 at *13 (Walker, C.J., concurring).[6]

Conference. If this Court chooses to grant review in *Gonzales*, it should either hold this Petition pending the outcome of *Gonzales* or should grant review and schedule argument for the same time that Gonzales is argued.

[6] As Chief Judge Walker observed:

> The standard announced in *Stenberg* is rendered all the more questionable when one considers that the constitutional provision that the Court invoked to strike down Nebraska's statute

(Continued on following page)

Although this Court granted certiorari in *Ayotte* to resolve that issue, the issue remains unresolved. This Petition is an ideal vehicle for resolving the question. Certiorari should be granted.

III. AT A MINIMUM, THIS COURT SHOULD GRANT, VACATE, AND REMAND FOR FURTHER PROCEEDINGS CONSISTENT WITH *AYOTTE*.

If this Court determines that it is inappropriate to grant certiorari on one or both questions presented, then this Court should grant, vacate, and remand for further proceedings consistent with *Ayotte*.

When a federal court is confronted with a statute that is constitutional in some circumstances, but not in others, federal courts should not choose "the most blunt remedy – permanently enjoining the enforcement of [the statute] and thereby invalidating it entirely." *Ayotte*, 126 S. Ct. at 969. Rather, federal courts should "enjoin only the unconstitutional applications of a statute while leaving other applications in force," or "sever its problematic portions while leaving the remainder intact." *Id.* at 967. *See also United States v. Booker*, 543 U.S. 220, 227-29 (2005) (mandating severability); *United States v. Raines*, 362 U.S. 17, 20-22 (1960) (enjoining unconstitutional applications). Although the judiciary must not "rewrite state law to conform it to constitutional requirements," *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988), judges must recognize that "[a] ruling of unconstitutionality frustrates the

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– the Due Process Clause of the Fourteenth Amendment – has generally been interpreted as a restraint on arbitrary government action. The Supreme Court should tell us what it is about abortion cases that necessitates an exception to this rule.

National Abortion Fed'n, ___ F.3d at ___, 2006 WL 225828 at *13 (Walker, C.J., concurring).

intent of the elected representatives of the people." *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984) (White, J., joined by Rehnquist, C.J., & O'Connor, J., announcing the judgment of the Court). Therefore, judicial remedies are limited to enjoining unconstitutional applications unless "consistency with legislative intent requires invalidating the statute *in toto*." *Ayotte*, 125 S. Ct. at 969.

If the Constitution establishes a *per se* rule that a health exception is required, then the Virginia Act is unconstitutional in those circumstances where: (1) the mother's health is in danger; *and* (2) the Act's life exception does not apply.[7] In all other circumstances, Virginia may prosecute physicians who perform partial birth infanticides.[8] Assuming that such circumstances exist[9] and

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[7] Of course, Virginia contends that the Constitution does not establish a *per se* rule of a health exception requirement. To the extent that *Stenberg* imposes such a requirement, *Stenberg* "was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent." *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

[8] Of course, if the Virginia Act is unconstitutional as applied to some circumstances, there will be criminal prosecutions where the physician claims that the Virginia Act is unconstitutional as applied to him. As with any claim that a statute is unconstitutional as applied to a criminal defendant, the issue will have to be decided on a case-by-case basis and often will turn on particular facts.

[9] Virginia contends that this is a null set. *See National Abortion Fed'n*, ___ F.3d at ___, 2006 WL 225828 at *12 (Walker, C.J., concurring) ("Congress had before it substantial evidence that, even if the D & X procedure is wholly prohibited, a woman can obtain a safe abortion in almost every conceivable situation."). There are no circumstances where the mother's health is in danger, but her life is not threatened.

Indeed, Dr. Fitzhugh concedes that in the case of a vertex or headfirst delivery where the fetus is delivered intact and substantially outside the mother's body, it is not necessary to kill the fetus to protect the health of the mother. *App.* at 41 (Niemeyer, J., dissenting). Moreover, Dr. Fitzhugh concedes that in the case of a breech or feet first delivery, there is generally no need to kill the fetus to protect the health of the mother. It is only the rare circumstance where the head becomes lodged in the cervical os, which "poses a threat to the mother's *life*, and to abate that risk, Dr. Fitzhugh

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assuming that Dr. Fitzhugh may challenge the Virginia Act,[10] then the proper remedy is to enjoin Virginia from prosecuting physicians who perform partial birth infanticides when the mother's health is at risk, but her life is not. This is the only permitted remedy unless it can be shown that the Virginia General Assembly would prefer *allowing all* partial birth infanticides to *banning most* partial birth infanticides. *Ayotte,* 126 S. Ct. at 968 ("After finding an application or portion of a statute unconstitutional, we must next ask: Would the legislature have preferred what is left of its statute to no statute at all?").

In an attempt to avoid a grant, vacate, and remand, Dr. Fitzhugh argues that the Virginia General Assembly would prefer *allowing all* partial birth infanticides to *banning most* partial birth infanticides. This argument defies logic and completely ignores Virginia law regarding the significance of legislative history and the presumption of severability. *See Department of Treasury v. Fabe*, 508 U.S. 491, 509-10 (1993) (When a state statute is challenged in federal court, state law controls on the issue of severability.). Quite simply, legislative history –

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prefers to crush the skull of the fetus and then remove it." *App.* at 43 (Niemeyer, J., dissenting). In this circumstance, however, Dr. Fitzhugh concedes that the mother's life would be at risk and thus covered by the Act's life exception such that no health exception is required. *App.* at 44 (Niemeyer, J., dissenting). In any event, the existence of such circumstances is an issue for remand.

[10] If federal courts are required to entertain facial challenges alleging overbreadth in the abortion context, then Dr. Fitzhugh may challenge the Virginia Act regardless of whether he actually performs partial birth infanticides under any circumstances. However, if federal courts may not entertain facial challenges alleging overbreadth, then Dr. Fitzhugh must demonstrate that he actually performs partial birth infanticides in circumstances where the mother's health is threatened, but her life is not. Outside of the overbreadth context, a litigant "may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." *Ferber*, 458 U.S. at 767.

subcommittee reports, committee hearings, floor statements, and a Governor's suggested amendments – are not considered by the Virginia courts. *See Williams v. Virginia*, 576 S.E.2d 468, 470 (Va. 2003). Rather, Virginia's courts "determine the General Assembly's intent from the words contained in the statute." *Id.* Moreover, by enacting *Virginia Code* § 1-243,[11] "the Virginia legislature has stated clearly that courts are now to apply a presumption of severability. . . ."[12] *Sons of Confederate Veterans, Inc. v. Commissioner of the Dep't of Motor Vehicles*, 288 F.3d 610, 627 (4th Cir. 2002). In any event, the issue of what Virginia law provides with respect to legislative history and severability is an issue for remand. *See Virginia v. Black*, 538 U.S. 343, 367-68 (2003) (directing Supreme Court of Virginia to consider severability of statute on remand).

Therefore, at a minimum, this Petition should be granted, the judgment vacated, and the matter remanded to the lower courts for reconsideration of the remedy consistent with *Ayotte*.

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[11] The provision states in part, "[t]he provisions of acts of the General Assembly or the application thereof to any person or circumstances that are held invalid shall not affect the validity of other acts, provisions, or applications that can be given effect without the invalid provisions or applications." *Virginia Code* § 1-243.

[12] Moreover, the Supreme Court of Virginia has emphasized:

> Severability, as codified in § [1-243], is a rule of judicial construction of statutes. As such, the possibility of severance cannot be waived by a party to a suit by failure to raise it. Rather, it is the duty of the Court, faced with a constitutional challenge to a statute, to consider *sua sponte* whether an invalid portion of a statute may be severed to permit the continued operation of the constitutional portion of the statute. The Court cannot be forced to accept a flawed construction of a statute or prevented from saving a statute from invalidity simply because of an oversight or tactical decision by one or both of the parties."

Elliott v. Virginia, 593 S.E.2d 263, 268 (Va. 2004).

CONCLUSION

For the reasons stated above and in the Petition itself, the Petition for a Writ of Certiorari should be **GRANTED.** In the alternative, this Court should **GRANT, VACATE, AND REMAND** for further proceedings consistent with *Ayotte.*

Respectfully submitted,

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